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REPORTS OF CASES

DECIDED BETWEEN

NOVEMBER 19, 1966 and JUNE 23, 1967

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1966 and JANUARY TERM 1967

VOLUME CLXXXI

WALTER D. JAMES
OFFICIAL REPORTER

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT
For the benefit of the State of Nebraska

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[1] Term expired January 15, 1967
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IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1966

IN RE APPLICATION OF RAPID FILM SERVICE, INC. RAPID FILM SERVICE, INC., APPELLEE, V. BEE LINE MOTOR FREIGHT ET AL., APPELLANTS.

146 N. W. 2d 563

Filed November 25, 1966. No. 36272.

1. **Public Service Commissions: Appeal and Error.** The Nebraska State Railway Commission has the right to interpret its certificates of public convenience and necessity and this court should review or interfere with such an interpretation made by the commission only when it is necessary to keep it within its jurisdiction and to protect legal and constitutional rights, and when the order is arbitrary and unreasonable.
2. ———: ———. The Nebraska State Railway Commission and this court, on review, cannot go behind a grandfather certificate to show that truck operations prior to the issuance of the certificate were different than those authorized by the certificate.
3. **Public Service Commissions: Motor Carriers.** A long-continued operation, under color of authority to transport commodities generally, and the knowledge of the Nebraska State Railway Commission of such transportation, support a conclusion that the original certificate intended to grant authority for the transportation of commodities generally.
4. **Words and Phrases.** The word "and" is a conjunction connecting words or phrases expressing the idea that the latter is to be added or taken along with the first and in interpreting the effect or the use of the word "and" the word "or" can be substituted therefor.

Appeal from the Nebraska State Railway Commission. Affirmed.

Nelson, Harding, Acklie, Leonard & Tate and Viren, Emmert & Epstein, for appellants.

James E. Ryan and Jerry L. Snyder, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MANASIL, District Judge.

WHITE, C. J.

This is an appeal from an order of the Nebraska State Railway Commission interpreting a certificate of public convenience and necessity issued to the appellee, Rapid Film Service, Inc.

On January 31, 1938, the Nebraska State Railway Commission issued a "grandfather" certificate to Richard R. and Herbert E. Lysinger, doing business as Rapid Film Service, which authorized it to transport commodities as follows: "Commodities generally and specially to wit: Motion picture films, mainly, but also automobile accessories, yeast, oil and greases and small freight." On June 30, 1965, this cerificate was transferred to the appellee, Rapid Film Service, Inc. A petition was filed by the appellants on July 16, 1965, requesting an interpretation of this certificate. After hearing on September 9, 1965, the commission entered an order on December 15, 1965, interpreting the certificate in question to authorize the transportation of, "commodities specially to-wit: Motion picture film and commodities generally." From this order granting authority to transport commodities generally this appeal is taken.

The evidence shows that the appellee's predecessor, Richard R. and Herbert E. Lysinger, doing business as Rapid Film Service, filed its original application for a grandfather certificate on August 26, 1936. The hearing on this application was held on October 22, 1937. The evidence adduced at this hearing was to the effect that the main business of the applicant was the transportation of motion picture film, but that it transported many other commodities. The applicant produced evidence

that it transported motion picture films mainly but also auto accessories, tires, batteries, yeast, oil and greases, and small freight. One of the partners testified at the original hearing that at that time the partnership was moving "commodities generally and especially moving picture films to and from various points."

The evidence also shows that at the time of the original hearing on October 22, 1937, the partnership was operating with a 1½-ton 1936 Dodge and two 1937 ½-ton Ford pick-ups. A list attached to the grandfather application showed the transportation of auto parts, theater equipment, auto parts and supplies, theater film and advertising, oil and greases, oil barrels, paint in cans, linseed oil, auto radios, and yeast products. There is also evidence of many commodities that were being transported that were not listed in the original application, such as fence and wiring, steel rods for blacksmith shops, furniture, groceries, etc. There was testimony before the commission that in its business prior to the time of the original hearing on the application the partnership was trucking anything that could be put in a truck. The term, "Motion Picture films mainly," appears in the original certificate. The evidence shows that the reason for this was that the transportation of motion picture films was considered to be a special commodity, recognized as being different from commodities generally and requiring more than the minimum of cargo insurance.

Subsequent to this hearing the examiner found that the applicant "was in actual bona fide operation as a common carrier of commodities generally and specially, to-wit: Motion Picture films, mainly, but also automobile accessories, yeast, oil and greases and small freight, by motor vehicle April 1, 1936, * * *." Based on this finding, the commission granted a "grandfather" certificate on January 31, 1938, as follows: "Commodities generally and specially, to-wit: Motion Picture films, mainly, but also automobile accessories, yeast, oil

and greases and small freight." Since the issuance of this grandfather certificate, the appellee's predecessor, a partnership, has continued to transport all kinds of commodities. The commission conducted, through its inspector, an examination of the types of commodities transported and the record shows that they varied from one gallon of alcohol to a corn binder. The commission never advised appellee's predecessor that there was anything about its transportation that was illegal. The evidence shows that it has continued operations and handled various shipments of electrical appliances and articles weighing thousands of pounds. It has added to its equipment and now owns 26 pieces of equipment which can carry pay loads of 27,900 pounds. At the present time only 22 percent of the partnership's gross revenue is gained from the transportation of motion picture films and accessories, and the remaining 78 percent of gross revenue is derived from the transportation of general commodities.

The commission's order of December 15, 1965, interpreting the original certificate, deleted the description of specific commodities and authorized the transportation of motion picture films and commodities generally. The appellants contend that the words, "to-wit" and "small freight" limit the grant of the authority of appellee and restrict its transportation of general commodities to the classification of small items of general merchandise. We do not agree. Appellee's commodity authorization and certificate granted appellee two separate authorities. One authority was to transport commodities generally and the other was to transport special commodities enumerated in the certificate. The two grants are separated by the word "and." We believe the correct interpretation of the language involved herein, in context, is that the word "and" means along with, also, or as well as. The word "and" is "A conjunction connecting words or phrases expressing the idea that the latter is to be added or taken along with the first." Black's Law

Dictionary (4th Ed.), p. 112. See, Cincinnati Enquirer, Inc. v. American Sec. & Trust Co., 107 Ohio App. 526, 160 N. E. 2d 392; Carter v. Keesling, 130 Va. 655, 108 S. E. 708; Porter v. Moores, 4 Heisk. (Tenn.) 16. Although there is a diversity of authority on this subject, the word "or" may be substituted for the word "and" depending upon the context of the language. See Carlsen v. State, 127 Neb. 11, 254 N. W. 744. We point out that this interpretation gives meaning to all of the language of the grant and does not restrict it, as the appellants would have us do, to a simple description and limitation of specific commodities mentioned after the word "to-wit." We hold, therefore, that when a certificate shows that authority is granted for the transportation of commodities generally, the addition of the words "commodities specially to-wit" is not a restriction of the commission authority granted to the appellee for the transportation of general commodities.

It appears, therefore, that the interpretation of its own certificate made by the commission is reasonable. It may not be interfered with by this court in the absence of a showing that it is illegal, arbitrary, or unreasonable. Appellants cite a Utah case, W. S. Hatch Co. v. Public Service Commission, 3 Utah 2d 7, 277 P. 2d 809, to the effect that the rule requiring a showing of arbitrariness and unreasonableness is not applicable in this case and that the court should approach the problem as being purely a question of law for its decision. The proper rule in Nebraska is that the commission has the right to interpret its certificates of public convenience and necessity and this court should review or interfere with such an interpretation made by the commission only when it is necessary to keep it within its jurisdiction and to protect legal and constitutional rights, and when the order is arbitrary and unreasonable. In re Application of Meyer, 150 Neb. 455, 34 N. W. 2d 904; Kassebaum v. Nebraska State Railway Commission, 142 Neb. 645, 7 N. W. 2d 464.

Appellants in this case attempt to support their position by reviewing the contents of the grandfather application and the evidence offered to support it. There are two answers to this contention. First, there is evidence to support the examiner's and the commission's original finding that the appellee's predecessor was transporting commodities generally. It is true that the appellee's predecessor was limited as to size of goods actually transported by the types of trucks that it was using then. However, the evidence shows that it was transporting a wide range of commodities and it was moving "commodities generally and especially moving picture films to and from various points." In the light of these circumstances we are unable to hold that the commission's finding interpreting its own certificate is arbitrary or unreasonable. Second, we have held that the commission and this court, on review, cannot go behind a "grandfather" certificate to show that truck operations prior to the issuance of the certificate were different than those authorized by the certificate. Kassebaum v. Nebraska State Railway Commission, *supra*. In that case, in which this court had before it an appeal from the commission concerning the interpretation of a grandfather certificate, the court held as follows: "The Commission cannot, in this proceeding, go behind the certificate and show that Kassebaum's operations prior to that period were different than those set out in his certificate."

Appellants, citing authorities, contend that the word "to-wit" limits the language preceding it and restricts the appellee and its predecessor to the transportation of small freight and small items of general merchandise. The precise question is whether the word "to-wit" limits all of the language of the grant or simply the words preceding it "and especially." It seems to us that it was reasonable for the commission to find, under the circumstances, that the word "to-wit" only modified the word "especially." The specific items enumerated

were simply a description of some of the items of merchandise that were being transported at the time of the grandfather hearing, and this description was not intended to be a limitation upon the grant of authority for transportation of "commodities generally" contained in the certificate.

The record also shows that the appellee's predecessor had been transporting commodities generally for a period of almost 30 years and during that period of time the commission had inspected the type of goods transported and made no objection to it under the certificate of authority already issued on January 31, 1938. In Andrews Van Lines, Inc. v. Nielsen & Peterson, Inc., 180 Neb. 764, 145 N. W. 2d 584, we held that evidence of operations under color of authority may be considered by the commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity. While this case is not directly in point, it seems applicable by a parity of reasoning. A long-continued operation, under color of authority from the original grant of the certificate to transport commodities generally, and the knowledge of the commission of such transportation, certainly support a conclusion of the commission that the original certificate intended to grant authority for the transportation of commodities generally.

We hold, therefore, that the order of the Nebraska State Railway Commission on December 15, 1965, interpreting the certificate to authorize the transportation of commodities generally is correct and should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL ALLEN CRAIG, APPELLANT.

146 N. W. 2d 744

Filed November 25, 1966. No. 36312.

1. **Constitutional Law: Criminal Law.** The exercise of discretionary power in sentencing codefendants to varying terms of imprisonment within the statutory limits for the crime charged is not a denial of equal protection of the law under the Fourteenth Amendment to the United States Constitution.
2. ———: ———. Section 29-3004, R. S. Supp., 1965, providing the district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of sections 29-3001 to 29-3004, R. S. Supp., 1965, does not require the appointment of counsel in all cases, and where a single question of law is involved, none need be appointed on appeal.

Appeal from the district court for Cheyenne County: JOHN H. KUNS, Judge. Affirmed.

Paul Allen Craig, pro se.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MANASIL, District Judge.

BROWER, J.

Appellant Paul Allen Craig filed a motion to vacate or set aside a judgment and sentence in a criminal action in the district court for Cheyenne County, under the provisions of sections 29-3001 to 29-3004, R. S. Supp., 1965.

The sole contention set forth in the appellant's motion was that he had been denied the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution in that he was convicted and sentenced to a term of imprisonment of 10 years whereas one other person charged with the same offense was released and not prosecuted and another charged

likewise was placed under probation for a period of 5 years.

An affidavit of poverty was filed by the appellant and the trial court appointed counsel for him. At a hearing had with the court-appointed counsel for appellant, the trial court denied and dismissed appellant's motion. It further failed to appoint counsel to assist him on appeal.

Contrary to the appellant's contention in his motion to vacate and set aside the judgment and sentence, the exercise of discretionary power in sentencing codefendants to varying terms of imprisonment within the statutory limits for the crime charged is not a denial of equal protection of the law under the Fourteenth Amendment. United States v. Vita, 209 F. Supp. 172; United States v. Litterio, 153 F. Supp. 329, affirmed 244 F. 2d 956, certiorari denied 355 U. S. 849, 78 S. Ct. 75, 2 L. Ed. 2d 57; Stevens v. State, 232 Md. 33, 192 A. 2d 73, certiorari denied 375 U. S. 886, 84 S. Ct. 160, 11 L. Ed 2d 115; Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49, 48 L. Ed. 121.

The appellant further contends the trial court erred in failing to appoint counsel to represent him on appeal to this court. In Douglas v. California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811, the United States Supreme Court held that under the Constitution of the United States, counsel must be provided an indigent on first appeal of right, but in that case stated: "We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the *first appeal,* granted as a matter of right to rich and poor alike * * *."

In Madison v. Tahash, 249 F. Supp. 600, the case of Douglas v. California, *supra,* was discussed and that case held: "Sixth Amendment's guaranty of right to

counsel does not apply to habeas corpus proceedings, which are in nature of civil actions. U. S. C. A. Const. Amend. 6." In Jackson v. United States, 221 F. Supp. 755, the federal court construed the federal statutes, 28 U. S. C. A., §§ 1915, 2255, pp. 333, 563, which provide counsel *may* be appointed on motions to vacate judgment of conviction, and held: "On motion to vacate judgment of conviction, indigent defendant was not entitled, as a matter of right, to court-appointed counsel. 28 U. S. C. A. §§ 1915, 2255.

"Because petition to vacate judgment, filed by indigent petitioner who had been granted leave to proceed in forma pauperis, raised no issue of fact but only question of law as to whether indictment was fatally defective, no counsel would be appointed. 28 U. S. C. A. §§ 1915, 2255." See, also, United States ex rel. Boone v. Fay, 231 F. Supp. 387, certiorari denied 380 U. S. 936.

We think section 29-3004, R. S. Supp., 1965, providing the district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of sections 29-3001 to 29-3004, R. S. Supp., 1965, does not require the appointment of counsel in all cases, and where a single question of law is involved, none need be appointed on appeal.

In the case before us, counsel was appointed to represent the indigent defendant in the trial court on the hearing of his motion. Save for the appointment of counsel on appeal, only one question of law is before this court. We fail to see how counsel could have been of assistance to the appellant to resolve this narrow and uncomplicated issue.

We find no error in the trial court's ruling and its judgment is therefore affirmed.

AFFIRMED.

IN RE ESTATE OF EDWIN G. SPIETH, DECEASED. DOROTHY G. CAPRETTE, APPELLANT, V. EDWIN F. SPIETH, EXECUTOR OF THE ESTATE OF EDWIN G. SPIETH, DECEASED, APPELLEE.

146 N. W. 2d 746

Filed November 25, 1966. No. 36320.

1. **Husband and Wife: Descent and Distribution.** A man or woman may bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage. Such contract shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate, or executed in conformity with the laws of the place where made.
2. **Husband and Wife.** Antenuptial contracts should be construed according to the intentions of the parties and the conditions and circumstances attending their execution.
3. ———. When each party to a legally executed antenuptial contract is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the prospective wife does not shift the burden of proof to the husband or his representatives to sustain the contract.
4. **Husband and Wife: Descent and Distribution.** A widow may by the provisions of an antenuptial contract waive her right to allowances from the estate of her husband even though the contract may not in express terms mention such right.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge.

O. A. Drake, for appellant.

Munro, Parker & Munro, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and HASTINGS, District Judge.

SPENCER, J.

This action involves the validity of an antenuptial contract and its effectiveness to bar an election and an application for allowances. The trial court held against the surviving widow, and she has perfected an appeal to this court.

Dorothy Crook, hereinafter referred to as appellant,

married Edwin G. Spieth, hereinafter referred to as Spieth, on February 11, 1960. At that time she was 58 years of age and employed as a secretary to the head of the mortgage department of a savings and loan association. She had previously been employed as a legal secretary. Spieth at the time of the marriage was 80 years of age.

Previous to the marriage the parties executed an antenuptial contract which among other things contained the following stipulations: "WHEREAS, the parties desire that all property now owned or hereafter acquired by each of them shall, for all purposes in this Agreement set forth, be free of any claim of the other, which may arise by reason of their contemplated marriage, except as expressly provided in Paragraph VI hereof; and

"WHEREAS, each party is represented by separate counsel and each has been separately advised by such counsel prior to entering into this Agreement; * * *

"Each party hereby waives, surrenders and releases all rights of inheritance of every kind and nature whatsoever in or to the property of the other party, including all rights given by any statute relating to inheritance of property, descent and distribution, intestate estates and right of election to take under statute and not under Will, whether now in effect or whenever enacted and as any statute is now construed or may hereafter be construed by any court. * * *

"Each party does by this Agreement quit-claim, renounce and convey to the other party all right, title or interest in the property of the other party which he or she may appear at any time to have; and each agrees, at the request of the other to execute any conveyance or to join in any conveyance of real estate or other property owned by the other party, which may be necessary or advisable in order for the other party to make a conveyance of his or her own property, or to execute any instrument which may be necessary or advisable to carry

into effect the intentions and provisions of this Agreement."

Attached to and made a part of the agreement is exhibit "A" which is a detailed description of the property of Spieth, and while the value of the real estate is not set out in the exhibit, the real estate is sufficiently described to indicate its extent and to make the ascertainment of the actual value a simple matter. The agreement specifically waived any showing of value other than set out therein.

Exhibit "B" attached to and made a part of the agreement is a list of the property of appellant which she claims was not attached at the time the agreement was signed but was subsequently added to the agreement by her. Exhibit "B" described only a portion of her property and omitted substantial annuities held by her.

Paragraph IV of the agreement specifically provided for the release of all rights of homestead, but provided that Spieth would execute a will devising any residence owned and occupied by the parties to appellant at his death. The parties were living in a rented apartment at the time of the death of Spieth. However, less than 4 months after the marriage Spieth bought a residence property in Kearney, Nebraska, title to which was taken in his name and appellant's name. Subsequently, a deed was executed by and to the parties in consideration of "LOVE AND AFFECTION AND ANTENUPTIAL AGREEMENT," creating a joint tenancy with rights of survivorship. The title to this property was so held at the time of Spieth's death.

The record indicates that subsequent to the marriage, appellant took over some of the bookkeeping activities on Spieth's properties and helped in the management of said properties.

Appellant alleged that the antenuptial contract was invalid on several grounds, including misrepresentation, insufficient disclosure, improper execution, and failure of performance of an executory feature of the contract.

In a 20-page brief replete with conclusions, appellant devotes only 2 pages to argument and confines that argument to the issue of misrepresentation.

Appellant admits the execution of the contract. It contains a stipulation that each party was represented by separate counsel, and that each had been separately advised by such counsel prior to entering into the agreement. Suffice it to say that on the record if there was any overreaching it was not on the part of Spieth. We hold that appellant is estopped to take advantage of her failure to fully describe her own property if that is her contention to establish insufficient disclosure. Appellant appears to be a competent, active businesswoman who had legal advice, and on the record herein must be held to be chargeable with knowledge of the extent and value of the Spieth property. It would strain credulity to hold she was ignorant of all the legal implications of the contract.

A man or woman may bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage. Such contract shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate, or executed in conformity with the laws of the place where made. See § 30-106, R. R. S. 1943. The contract was executed in full compliance with this statute.

Antenuptial contracts should be construed according to the intentions of the parties and the conditions and circumstances attending their execution. Tiernan v. Tiernan, 107 Neb. 563, 186 N. W. 369.

Appellant urges that the burden is upon the representative of her deceased husband to show that the antenuptial contract, apparently unjust to her, was fairly procured. Assuming appellant's premise that the contract is unjust and that she did not realize the value of the Spieth real estate because the contract did not set

out its value, appellant is entitled to no relief. The rule in Nebraska is that when each party to a legally executed antenuptial contract is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the prospective wife does not shift the burden of proof to the husband or his representatives to sustain the contract. Kingsley v. Noble, 129 Neb. 808, 263 N. W. 222. Appellant has wholly failed to meet her burden.

Appellant did not argue her assignment of error that an executory feature of the contract was not performed. This contention refers to the provision for the execution of a will devising any residence owned and occupied by the parties to appellant at Spieth's death. We note that the parties were living in a rented apartment at the time of Spieth's death. Further, shortly after the marriage Spieth purchased a residence in Kearney which was occupied by the parties and which was so held that appellant became the sole owner of the property at Spieth's death. The conveyance which accomplished this purpose specifically refers to the antenuptial contract in the consideration and was obviously an attempt to provide a home for appellant. There is no merit to this assignment of error.

While the appellant did not enumerate or argue her position on the refusal of the trial court to grant her request for allowances, we assume it is based on a misinterpretation of the holding in In re Estate of Maag, 119 Neb. 237, 228 N. W. 537. It should be noted that the contract in that case was held to be invalid and unenforceable.

The applicable section of the statute on family allowances is section 30-103, R. R. S. 1943, which provides in part: "* * * the surviving spouse and children, if there be children, constituting the family of the deceased, shall have such reasonable allowance out of the personal estate, or out of the income of the real estate, as the county court shall judge necessary for their main-

tenance during the progress of the settlement of the estate, according to their circumstances, which shall not be longer than one year after granting administration, nor for any time after the personal estate shall be assigned to the surviving husband or wife; * * *."

We determine that paragraph III of the antenuptial contract specifically waived any allowances herein. We further hold that a widow may, by the provisions of an antenuptial contract, waive her right to allowances from the estate of her husband even though the contract may not in express terms mention such right.

For the reasons given, the judgment herein is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VIRGIL RONZZO, APPELLANT.

146 N. W. 2d 576

Filed November 25, 1966. No. 36338.

Constitutional Law: Criminal Law. If the motion of a prisoner and the files and records of the case show to the satisfaction of the district court that the prisoner is entitled to no relief under the Post Conviction Act, the court may overrule the motion without a hearing. § 29-3001, R. S. Supp., 1965.

Appeal from the district court for Wheeler County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Edward E. Hannon, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and HASTINGS, District Judge.

SMITH, J.

Defendant moved under the Post Conviction Act for an order vacating a sentence of life imprisonment for the

crime of murder in the second degree. The district court dismissed the motion without a hearing. See § 29-3001, R. S. Supp., 1965. Defendant alleged that he had not been informed of his constitutional rights in respect to police interrogation and that he had been denied assistance of counsel.

The time and substance of police interrogation are speculative, and the record negatives a suggestion of prejudice. Defendant appeared without counsel at the preliminary hearing October 19, 1959, entering a plea of not guilty. On October 30, 1959, the district court appointed counsel who represented defendant throughout the remainder of the proceeding. Defendant pleaded guilty November 17, 1959, the court pronouncing judgment and sentence the same day. In this post conviction proceeding counsel was not appointed prior to dismissal of the motion.

A hearing is required "Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, * * *." § 29-3001, R. S. Supp., 1965. The present appeal has no merit. See, State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428; State v. Silvacarvalho, 180 Neb. 755, 145 N. W. 2d 447. The judgment is affirmed.

AFFIRMED.

THE ELGIN MILLS, INC., A CORPORATION, APPELLANT, V. ARDEN MELCHER, APPELLEE.

146 N. W. 2d 573

Filed November 25, 1966. No. 36339.

1. **Evidence.** The parol evidence rule does not exclude evidence that no contract was made.
2. **Contracts.** If a party to a contract proposes a modification, mere silence of the other party leaves the contract without modification.
3. **Contracts: Warehousemen.** Without a consideration, a pur-

ported agreement in a warehouse receipt does not modify a prior contract.

Appeal from the district court for Stanton County: GEORGE W. DITTRICK, Judge. Affirmed.

Stephen P. Finn, Deutsch & Hagen, and Craig F. Svoboda, for appellant.

Nelson, Harding, Acklie, Leonard & Tate, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and HASTINGS, District Judge.

SMITH, J.

The question presented here is the liability of defendant Melcher for storage charges under terms of warehouse receipts issued by plaintiff company. The receipts represented corn sold by the company to Melcher. He alleged in defense that those charges had been included in the price of the corn under oral terms of the sale. A jury found for him, and from denial of a new trial the company has appealed.

The evidence was sufficient for a finding of the following facts: On December 27, 1962, the parties agreed upon a price of $1.05 per bushel for 25,000 bushels and a transportation charge of $.05 per bushel. The president of the company, Lambert Vanderheiden, orally promised to store the grain without additional charge until other persons delivered their vetch crops of the next year for storage. Because Melcher needed evidence of ownership for the purpose of obtaining a bank loan, the company prepared five warehouse receipts of even date. Melcher paid the purchase price of $26,250 January 4, 1963, but the receipts were not then delivered to him. At his request the company sent them to a designated bank, and it is inferable that the bank received them at a time subsequent to payment of the purchase price. On January 11, 1963, Melcher signed on the back of each receipt a statement of unencumbered ownership.

He withdrew the corn prior to October 1963, and the receipts were canceled.

In the receipts a printed form relating to payment of storage charges was blank. The rate appeared as follows: "The charge for * * * storing * * * said grain shall be the fee set out in Schedule B, issued by the Nebraska Railway Commission * * *."

The jury heard testimony concerning other transactions. The company had sold 30,000 bushels of corn to Melcher the preceding year. Vanderheiden testified to a price of $.94 per bushel, an advance of $.07 per bushel on storage, and respective totals of $28,200 and $2,100. Melcher testified that any storage charges had been included in the sale price. He had paid $25,000 at the time of sale and the balance of $5,300 in December 1962. Payment of storage charges was not noted on warehouse receipts for the corn.

Norfolk Feed Mills in 1960 and 1963 purchased from plaintiff company grain for future delivery. Although warehouse receipts were issued, storage charges were included in the purchase price.

In the argument for liability the company relies on the parol evidence rule as follows: Acceptance of the receipts implied a binding promise of payment by Melcher, and the receipts may not be contradicted by parol evidence.

"The first issue to be determined is, Has a contract been made? One party asserts a contract and asks its enforcement; the other denies the contract asserted by the first * * *. If * * * no contract has been made, it will not be necessary to determine the later issue of complete integration in writing. These two issues may sometimes be so interrelated that it is easier to deal with them jointly; but, whether they are or not, it is certain that we need not begin excluding parol evidence until we know that a contract has been made." 3 Corbin on Contracts, § 577, p. 385.

The evidence is sufficient for a finding that the sale

contract was made prior to delivery of the receipts. "If a party to an existing contract proposes a modification thereof, the mere silence of the other party leaves the contract as before without modification." 1 Corbin on Contracts, § 72, p. 306. Without a consideration, a purported agreement in a warehouse receipt does not modify a prior contract between the parties. In such circumstances acceptance of the receipt does not imply a binding promise. See, Grain Dealers Nat. Fire Ins. Co. v. Union Co., 159 Ohio St. 124, 111 N. E. 2d 256; Colgin v. Security Storage & Van Co., Inc., 208 La. 173, 23 So. 2d 36; 1 Williston on Contracts (3d ed.), § 90C, p. 309; cf. Northern Pac. Ry. Co. v. American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. Ed. 269.

As a public grain warehouseman the company was under a statutory duty to charge storage rates fixed by the railway commission, and discriminatory charges were prohibited. §§ 88-206 and 88-209, R. R. S. 1943, repealed by § 10-102, U. C. C. Melcher's version of the transaction, however, was consistent with the language and the spirit of the legislation. Inclusion of the charges in the sale price offended no statute, although the precise amount depended upon the time of delivery of the vetch crops.

The evidence was sufficient for the jury to find against the company on the alleged agreement. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MERLE W. BURNSIDE, APPELLANT.

146 N. W. 2d 754

Filed December 2, 1966. No. 36288.

1. **Criminal Law. Under section 29-3004, R. S. Supp., 1965, of the Post Conviction Act, it is within the discretion of the district**

court as to whether counsel shall be appointed to represent a defendant on appeal to this court and, in the absence of a showing as to abuse of this discretion, the failure to appoint counsel on appeal is not error.

2. **Criminal Law: Indictments and Informations.** When a defendant in a criminal action has been properly tried and convicted of a felony criminal charge, the fact that the information improperly contained another count charging the defendant as a habitual criminal and that he was sentenced thereon will not invalidate the finding of guilty on the felony criminal charge.
3. **Criminal Law.** An unauthorized or erroneous sentence does not void a lawful conviction.
4. ———. A sentence imposed within the limits prescribed by the statute will not be altered or reduced unless it appears that there was an abuse of discretion on the part of the trial court.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Merle W. Burnside, pro se.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

WHITE, C. J.

This is a post conviction proceeding under the provisions of sections 29-3001 to 29-3004, R. S. Supp., 1965.

On September 22, 1960, defendant was convicted by a jury of the crime of robbery under section 28-414, R. R. S. 1943. The information also contained a count, under the habitual criminal statute, section 29-2221, R. R. S. 1943. On November 3, 1960, at a hearing, the district court found that the defendant was guilty as charged and that he was a habitual criminal and sentenced him to 15 years in the Nebraska State Penitentiary. No appeal was taken. Under the post conviction statute, the court appointed counsel and the defendant filed an amended motion on October 8, 1965, which alleged that the defendant was illegally sentenced under the habitual criminal statute, section 29-2221, R. R. S. 1943. On Jan-

uary 7, 1966, the district court held a hearing on this motion and evidence was introduced. The habitual criminal act provides for a penalty from 10 to 20 years. It expressly provides that it shall not apply where a greater punishment is otherwise provided by the statute defining the offense committed. The punishment for the crime of robbery is a sentence of from 3 to 50 years. § 28-414, R. R. S. 1943. The district court held that the prayer of the amended motion should be granted and that the defendant had been erroneously sentenced under the habitual criminal act. It set aside the previous sentence and sentenced the defendant to the Nebraska Penal and Correctional Complex "for a period of 15 years with sentence to run from Nov. 3, 1960." The defendant appeals.

Defendant claims error in that he was denied counsel in this appeal. Under the statute, section 29-3004, R. S. Supp., 1965, it is discretionary with the district court as to whether an attorney shall be appointed to represent a defendant on appeal. A defendant has no constitutional right to the appointment of counsel in a post conviction proceeding. Douglas v. California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811, relates only to the question as to the right to counsel on his first appeal from an original conviction of the crime charged. The federal courts have long held that a defendant is not entitled as a matter of right to counsel in habeas corpus proceedings or in proceedings on motions to vacate a judgment of conviction. Madison v. Tahash, 249 F. Supp. 600; Jackson v. United States, 221 F. Supp. 755; 28 U. S. C. A., §§ 1915, 2255, pp. 333, 563; Eskridge v. Rhay, 345 F. 2d 778; Hatfield v. Bailleaux, 290 F. 2d 632. We point out further that the defendant was granted the relief that he asked for in the district court. Under these circumstances, there was clearly no abuse of discretion by the district court in failing to appoint counsel on appeal. There is no merit to this contention.

It is difficult to follow the other contentions of the

defendant. He argues at length as to the erroneousness of the original sentence because it was based upon a finding that he was a habitual criminal. He seems to contend that because the original sentence was erroneous, having contained a finding that he was a habitual criminal, therefore the conviction on the criminal count of robbery was invalidated. We assume, for the purposes of this case, that the original sentence on the finding that the defendant was a habitual criminal is erroneous. But, the finding that the defendant is a habitual criminal does not constitute conviction and sentence for any separate offense. This charge and information merely permitted the court to inflict a greater penalty because of the defendant's previous convictions. Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82. Defendant was tried and convicted by a jury for the offense of robbery. His motion does not allege that he was deprived of any constitutional rights up to the time of his trial and conviction. His main contention relates to the erroneousness of his sentence. We have repeatedly held that an unauthorized or erroneous sentence does not void a lawful conviction. Kennedy v. State, 171 Neb. 160, 105 N. W. 2d 710; Haswell v. State, 167 Neb. 169, 92 N. W. 2d 161. We find no merit in the defendant's contention.

The record here shows that the most the defendant was entitled to was a vacation of the original sentence and a resentence on the count of robbery for which he was properly tried and convicted. This relief he was granted. The new sentence was for the same period of time as the original sentence and began on the same date, November 3, 1960. The defendant is simply dissatisfied with the length of this sentence. But, it is clear that the new sentence was within the limits of the statutory penalty of from 3 to 50 years for the crime charged and is a valid sentence. The record fails to reveal any abuse of discretion in the imposition of the new sentence.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT STROH, APPELLANT.

146 N. W. 2d 756

Filed December 2, 1966. No. 36315.

1. **Evidence.** The trial court is necessarily granted a considerable amount of discretion with relation to the admissibility of evidence.
2. **Criminal Law.** Error in the proceedings of a trial will not be presumed but must affirmatively appear from an inspection of the record.
3. **Criminal Law: Evidence.** Errors in the rulings on the admissibility of evidence, which do not injuriously affect the substantial rights of an accused, are not grounds for reversal.
4. **Criminal Law.** Where the punishment of an offense is left to the discretion of a court within prescribed limits of the statute, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Wagener, Marx & Youngs and Norman Langemach, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

WHITE, C. J.

This is a prosecution for burglary under section 28-532, R. R. S. 1943. The information alleges that the defendant forcibly broke into and entered a building at 3900 Cornhusker Highway, owned by the Veterans of Foreign Wars, with the intent to steal property of value.

From a jury verdict of guilty and a sentence of 5 years in the Nebraska Penal and Correctional Complex, the defendant appeals.

The evidence, as far as necessary for the determination of the questions in this appeal, is that on the night of November 17, 1963, at about 10 o'clock p.m., Kenneth Leland, the manager of the Veterans of Foreign Wars Club at 3900 Cornhusker Highway, in the company of Denzel A. Dawson, another employee of the club, conducted a check of the building and the premises. They found a locking pin out of a bar across the rear door, the rear door unlocked, and a screen off an upstairs window which had been deposited underneath a stage in the building. Leland called the sheriff's office to report the circumstances. At approximately 12:30 o'clock a.m., deputy sheriff Louis E. Harroun arrived and was shown the back door of the building with the pin out of the bar and the window screen found under the stage. Harroun advised Leland that everything should be left as they had found it and that he would stake himself out in the downstairs room. Leland and the other employees left the premises and Harroun stationed himself in the northwest corner of the downstairs darkened bar room. At approximately 1:40 o'clock a.m., November 18, 1963, Harroun heard the rear door, which had been left unlocked, open and close. Shortly later he saw three men move single file into the club room where he was stationed. He observed that these men were carrying objects, and that they later placed these objects on the cigarette machine and guest register located in the room. These objects were a red and silver flashlight, a black and silver flashlight, a hammer, a tire iron, and a screw driver. They were introduced in evidence over objection as exhibits 6, 7, 8, 9, and 10. The officer testified that he picked them up off the cigarette machine and guest register where they had been placed by the three men. The officer, in his foundation testimony, did not identify any of these objects as being

carried by any particular individual. Harroun ordered these men to halt, proceeded across the room to within 10 or 15 feet of where the men were standing, and ordered the men to stand in front of the cigarette machine and the guest register, while he moved over to the phone booth in the room to make a phone call to secure help. While making the phone call, the defendant walked over close to Harroun and asked that he be released stating he had a wife and children. The men started moving about while Harroun was making the phone call and he warned them not to attempt an escape. They continued to move about, he warned them twice, and then fired a warning shot with his gun. The defendant grabbed his arm and fell to the floor screaming that he had been shot, and a little while later, seeing Harroun making his phone call, he arose, ran for the door, and made his escape. The defendant was positively identified by officer Harroun as being one of the three men. The defendant was further identified by other witnesses as having been on the premises and in the Veterans of Foreign Wars Club the preceding day.

The defendant first contends that it was prejudicial error for the trial court to not strike from the testimony the evidence regarding the screen of an upstairs window being removed and found under a stage a few hours before the alleged breaking and entering took place. He says that this evidence is immaterial and prejudicial since there is no evidence to show that the entrance was gained through the window from which the screen was removed, and there is nothing to connect the defendant with the removal of the screen. It is noted that this testimony was received without objection and the question arises here from a motion to strike this testimony at the conclusion of the State's case. The trial court is necessarily granted a considerable amount of discretion with relation to the admissibility of evidence. Error in the proceedings of a trial will not be presumed but must affirmatively appear from an in-

spection of the record. Whitney v. State, 53 Neb. 287, 73 N. W. 696; Abbott v. State, 160 Neb. 275, 69 N. W. 2d 878. And, errors in the rulings on the admissibility of evidence, which do not injuriously affect the substantial rights of an accused, are not grounds for reversal. Cook v. State, 111 Neb. 590, 197 N. W. 421; Franz v. State, 156 Neb. 587, 57 N. W. 2d 139; Hameyer v. State, 148 Neb. 798, 29 N. W. 2d 458. Assuming, for the purposes of argument, that this testimony is immaterial, we fail to see where it in any way prejudices any substantial right of the defendant. Testimony with regard to the screen was introduced for the same purpose as the testimony with regard to the unlocked back door which was admitted without objection. The purpose was to show that the club manager had reason to believe that someone had set the building up for a later entry. It is not suggested that the evidence concerning the screen resulted in the defendant's conviction, nor is it suggested that in the absence of such testimony there is not sufficient evidence in the record to sustain a verdict of guilty. Considerable discretion is granted to the trial court in the admissibility of testimony concerning the circumstances surrounding and leading up to the commission of a crime. The defendant has not shown that he was prejudiced by the admission of this testimony and the refusal of the trial court to strike it from the record. There is no merit to this contention.

Defendant's next contention is that it was error for the trial court to admit in evidence certain burglary tools consisting of flashlights, hammer, tire iron, and screw driver. He contends, in substance, that there is no evidence connecting the defendant with the ownership or actual possession of these tools. This evidence was highly material. The crime charged was breaking and entering with the *intent* to steal property of value. But, the evidence does show that defendant and his two accomplices entered the building together and that some of them had possession of the tools admitted in evidence

which were placed on the cigarette machine and the guest register. There is no direct identification of the defendant having possession of any one of these particular tools. The testimony was only relevant to the element of intent and we think, even assuming that these tools were exclusively in the possession of the defendant's two accomplices, it was material and admissible in bearing upon the intent of the defendant under the circumstances. Defendant cites no Nebraska authorities to support his position but relies upon People v. Fontana, 356 Ill. 461, 190 N. E. 910. In that case the defendant, along with two other men, was apprehended on the roof of a creamery building. A burglary had been committed in the creamery office and certain burglary tools were found at the scene of the burglary inside the building. The court held that it was prejudicial error to admit the burglary tools into evidence. But, in that case, the court said: "They were not found inside the building nor in the possession of any of the money or goods stolen nor in the possession of any burglars' tools. * * * Where there is no evidence connecting the person accused of burglary with the tools found at the scene of the crime and no proof that the articles found had ever been in the possession of *any* of the defendants, evidence relating to them is inadmissible." (Emphasis supplied.) There is evidence here that the defendant broke into and entered, along with two companions, the building in question. Even though not identified as having any particular tool in his possession, the entry into the building at 1:40 a.m. with two companions possessing such tools is sufficient to warrant an inference, under the circumstances, that he had knowledge of and was connected with the actual possession of such tools. It was relevant to the issue of intent. The above case also found that there was no proof that the articles found had ever been in the possession of any of the defendants. In this case, the opposite is true since the tools were found in the possession of either the defendant or his

two accomplices. The testimony was relevant and material under the circumstances and there is no merit to the defendant's contention.

Defendant next contends that his sentence of 5 years was excessive. The statute provides for imprisonment from 1 to 10 years. He argues that nothing of value was taken but the answer to that is patent. The defendant was apprehended before there was any opportunity to accomplish the purpose of the entry. The actual taking of property of value is not an element of the crime charged. However, such an element is only one of many that are addressed to the sound discretion of a trial judge in passing sentence. See sections 29-2215 and 29-2217, R. R. S. 1943, relating to presentence investigations. Where the punishment of an offense is left to the discretion of a court within prescribed limits of the statute, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion. Salerno v. State, 162 Neb. 99, 75 N. W. 2d 362; Hyslop v. State, 159 Neb. 802, 68 N. W. 2d 698; Taylor v. State, 159 Neb. 210, 66 N. W. 2d 514.

Defendant assigns as error the giving of certain instructions by the court with reference to reasonable doubt, circumstantial evidence, and aiding and abetting another in the commission of a crime. These assignments of error are not argued other than a statement that these instructions are ambiguous and difficult to comprehend. We have examined these instructions and they correctly state the law and are free from error.

It appears from the record of this case that the defendant has had a fair and impartial trial and one free from prejudicial error. The judgment of the district court for Lancaster County is correct and is affirmed.

AFFIRMED.

FLORIAN F. PFEIFER, APPELLANT, V. EDWARD J. KONAT, APPELLEE.

146 N. W. 2d 743

Filed December 2, 1966. No. 36337.

Negligence. Two prerequisites for a permissive inference from res ipsa loquitur are: The events indicate that the injury would not have occurred in the absence of negligence and that defendant was the negligent person.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Vogeltanz & Kubitschek, for appellant.

John E. Dougherty, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

SMITH, J.

In this malpractice action against a dentist, plaintiff alleged that an infection had resulted from negligence in the extraction of a tooth. After verdict for defendant and denial of a new trial, plaintiff appealed. The pivotal point, however, is the sufficiency of one type of circumstantial evidence—a permissive inference from res ipsa loquitur.

Plaintiff was a farmer and part-time worker at a sales barn. He consulted defendant the morning of February 26, 1963, about an aching tooth located farthest back in the lower jaw on the right-hand side. In preparation for the extraction, to which plaintiff consented, defendant sterilized the entire area with a methylate spray. For a mandibular nerve block he injected presterilized novacain with a disposable presterilized needle. All other instruments were autoclaved, and ordinary care was exercised in the use of sterile cloth. After extracting the third molar without complication, defendant applied a sterile sulfa pack.

The afternoon of that day plaintiff worked at the

sales barn 3 hours, but illness compelled him to go home and to bed. His wife applied hot packs to his jaw during the 24-hour period that immediately followed the extraction. Defendant had given no such instruction because any infection would travel toward the heat. Printed instructions by defendant emphasized application of ice packs in that period, but plaintiff may have been uninformed. The effect of those hot packs was not otherwise developed, and negligence in respect to lack of instructions is not argued.

Plaintiff consulted Dr. Robert Fox, a physician, on March 1, 1963, about pain, chills, swelling, and a mild paralysis of the jaw. Several days afterward Dr. Fox placed plaintiff on an antibiotic. In spite of further treatment the condition worsened, and defendant recommended an examination by Dr. L. T. Higgins, an oral surgeon, to whom the dental records were sent.

On the first examination of plaintiff March 14, 1963, Dr. Higgins observed moderate swelling and a postoperative trismus which is a tightening of the muscles of mastication. An X-ray photograph demonstrated satisfactory healing in the area of the tooth socket. Anticipating infection because of edema lateral to the right jaw, the doctor prescribed a diet, hot pack therapy, and an antibiotic. Two weeks afterward he noted progressive swelling without drainage, and he therefore placed an intraoral drain adjacent to the tooth socket. Following a period of improvement the condition worsened, and on May 22, 1963, plaintiff was hospitalized for 7 days. A culture was not obtainable for weeks after the extraction, and in the one the doctor at last obtained a staphylococcal infection was present.

It is undisputed that pain, swelling, and trismus are common aftereffects of such an extraction, and that the tooth socket healed satisfactorily. In the opinion of Dr. Higgins the trismus had been complicated by an outside infection in the infratemporal fossa, a space lateral to the jawbone. Possible sources of foreign bacteria in-

cluded any object and any other person; cause of the infection was unknown.

Two prerequisites for a permissive inference from res ipsa loquitur are: The events indicate that the injury would not have occurred in the absence of negligence and that the defendant was the negligent person. See Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N. W. 2d 252. Neither common knowledge nor expert testimony in the present case supports an inference that defendant was negligent. A finding that he exposed plaintiff to the foreign bacteria would be guesswork.

Because the facts do not permit an inference that defendant was negligent, the judgment is affirmed.

AFFIRMED.

LESTER LANGUIS ET AL., APPELLANTS, V. HELEN DE BOER ET AL., APPELLEES.

HAROLD E. WILLIAMS ET AL., APPELLEES, V. JERRY HOLDEN ET AL., APPELLANTS.

146 N. W. 2d 750

Filed December 2, 1966. Nos. 36351, 36353.

1. **Statutes.** In construing a statute, effect must be given if possible to all its several parts. No sentence, clause, or word should be rejected as meaningless if it can be avoided.
2. **Schools and School Districts.** Board to board petitions are available for changes affecting Class III, IV, V, and VI school districts and districts embracing cities and incorporated villages.
3. **States: Schools and School Districts.** The state is supreme in the creation and control of school districts and may, if it thinks proper, modify or withdraw any of their powers or destroy such school districts without the consent of the legal voters or even over their protests.
4. **Schools and School Districts: Appeal and Error.** Any person adversely affected by the changes made by the county superintendent pursuant to section 79-402, R. S. Supp., 1965, may proceed either by appeal or by error pursuant to section 25-1903, R. R. S. 1943.
5. ———: ———. Where both methods are employed, the trial

judge should consolidate the cases and try the consolidated case de novo as on appeal.

Appeals from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

William L. Walker and Earl Ludlam, for appellants.

Perry, Perry, Sweet & Witthoff, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

SPENCER, J.

Case No. 36353 is an appeal from the affirmance of the order of the county superintendent of Lancaster County dissolving School District No. 155, merging its territory with School District No. 160, and transferring its assets to said school district. Case No. 36351 is an appeal from the dismissal of an error proceeding from the same order of the county superintendent. Both cases were consolidated for trial in the district court by stipulation. Judgment was entered for appellees, and appeals were perfected to this court.

Appellants set out 11 assignments of error. A discussion of two of them will adequately present the questions involved.

Section 79-402, R. S. Supp., 1965, provides, so far as material herein, as follows: "The county superintendent shall * * * change the boundaries of any district upon petitions signed by sixty per cent of the legal voters of each district affected; Provided, that petitions must contain signatures of at least sixty-five per cent of the legal voters of each district affected in such instances as hereinafter indicated; * * *. Petitions proposing to * * * change the boundary lines of existing school districts shall, when signed by at least sixty per cent of the legal voters in each district affected, be submitted to the county committee for school district reorganization, established under sections 79-426.01 and 79-426.05. * * * The county committee shall also, within fifteen days

of receipt of the returned proposal, advertise and hold a public hearing at which the recommendations and action of the state and county committees shall be presented to the legal voters in attendance. * * * The county superintendent shall, within fifteen days, advertise and hold a hearing to determine the validity and sufficiency of the petitions. * * * Provided, changes affecting Class III, IV, V, and VI school districts and districts in which are located cities and incorporated villages may be made upon the petition of the school board or the board of education of the district or districts affected; provided further, that when a Class I or Class II school district petitions the school board or the board of education of a Class I or Class II school district to merge in whole or in part with such district, said petition of the petitioning district may be accepted upon the petition of the school board or the board of education of the accepting district; and provided further, that when a Class I school district petitions the school board or the board of education of a Class I school district with a six-man board to merge with such district, said petition of the petitioning district may be accepted upon the petition of the school board or the board of education of the accepting district."

Appellants urge that the last three provisos above set out apply only to the acceptance of legal voter petitions, and do not permit the school board to initiate the change. To use appellees' interpretation of appellants' position, "board to board petitions for merger are not available."

In construing a statute, effect must be given if possible to all its several parts. No sentence, clause, or word should be rejected as meaningless if it can be avoided. Rose v. Hooper, 175 Neb. 645, 122 N. W. 2d 753.

The first proviso reads: "Provided, changes affecting Class III, IV, V, and VI school districts *and* districts in which are located cities and incorporated villages may be made upon the petition of the school board or the board of education of the district or districts affected;

* * *." (Italics supplied.) The "and" can only mean that districts in which cities and villages are located are included as additional to the four districts specifically enumerated. There are only six classifications in the statute, so the reference must be to cities and incorporated villages in Class I and II school districts. The proviso also must be construed to permit the school board or board of education of any school district qualifying under this proviso either to petition for a change or to petition for the acceptance of a change. If appellants' construction were the proper one, the proviso would need to be read as though the words "the acceptance of" were inserted to modify the word "changes." To adopt appellants' construction would do violence to the plain intent of the proviso. We hold that board to board petitions are available for changes affecting Class III, IV, V, and VI school districts and districts embracing cities and incorporated villages.

The second and third provisos cover Class I or Class II school districts in which no cities or villages are located, and in them the proviso is restricted to the acceptance of petitions. The fact that these two subsequent provisos are so limited seems to furnish positive proof that the first proviso was not intended to be so limited. Otherwise, it would seem asinine to have three separate provisos.

School District No. 155 is a Class II district and embraces the village of Panama. It is therefore covered by the first proviso, as is School District No. 160, which is a Class III district.

Appellants argue that a change or alteration in boundaries of a school district must originate with the legal voters, and direct our attention to the previous holdings of this court that a school district may not maintain an action involving a change in boundary of the school district. See Hinze v. School Dist. No. 34, 179 Neb. 69, 136 N. W. 2d 434. Appellants ignore the fact that in section 79-402, R. S. Supp., 1965, as we construe it, the

Legislature has specifically authorized the school board or the board of education of certain school districts to petition for a change in boundaries. In this respect, we have often held that the state is supreme in the creation and control of school districts, and may, if it thinks proper, modify or withdraw any of their powers, or destroy such school districts without the consent of the legal voters or even over their protests. See De Jonge v. School Dist. of Bloomington, 179 Neb. 539, 139 N. W. 2d 296.

Fifteen of the legal voters of School District No. 155 filed objections with the county superintendent of schools to the granting of the petition for attachment of School District No. 155 to School District No. 160. After the granting of the petition by the county superintendent, some of the objectors filed a petition in error to the district court for Lancaster County. Some of those who did not join in the error proceedings perfected an appeal to the district court. Both groups were represented by the same attorneys. By stipulation, signed by the attorneys of record for all of the parties, both proceedings and one other which is of no consequence here were consolidated for trial in the district court. After trial de novo, the trial court determined the proceedings in error not to be a proper remedy herein by virtue of the fact that proceedings on appeal are now authorized, and dismissed the error proceedings. On the appeal proceedings, the trial court determined the order entered by the county superintendent was legal and proper, and approved and affirmed said order. The question has therefore been raised as to whether error proceedings are still available now that an appeal with trial de novo is provided.

Article I, section 24, Constitution of Nebraska, provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied."

The right of appeal in this state is purely statutory,

and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441.

One cannot be denied his right of review in the appellate courts, and proceedings in error are always resorted to where no other method is pointed out or provided for. Dodge County v. Acom, 72 Neb. 71, 100 N. W. 136.

Previous to 1963, there was no provision for appeal, and review of proceedings under section 79-402, R. S. Supp., 1961, was limited to proceedings in error. This section was amended by Legislative Bill 284, Laws 1963, c. 473, p. 1518, to provide that any person adversely affected by the changes made by the county superintendent may appeal to the district court. The obvious legislative intent was to simplify the review procedure by providing for appeal. See School Dist. of Wilbur v. Pracheil, 180 Neb. 121, 141 N. W. 2d 768. But does this mean appeal is exclusive? The trial court so held, and dismissed the proceedings in error.

In Moser v. Turner, 180 Neb. 635, 144 N. W. 2d 192, we said: "There is nothing in section 79-402, R. S. Supp., 1965, or in section 25-1937, R. R. S. 1943, which purports to take away the right to proceed in error under section 25-1901, R. R. S. 1943."

The finding of the trial court that the remedy provided by the 1963 amendment of the statute in question that appeal is exclusive is in error. We hold any person adversely affected by the changes made by the county superintendent pursuant to section 79-402, R. S. Supp., 1965, may proceed by appeal or by error proceedings, pursuant to section 25-1903, R. R. S. 1943. Where, as here, both methods are employed, the trial judge should consolidate the actions and try the consolidated case on appeal, as was done in this instance.

The erroneous determination that appeal is the exclusive remedy did not affect the result herein. The trial court on the trial de novo found that the order

entered by the county superintendent was legal and proper, and approved and affirmed that order. We find, after an examination of all the proceedings, that the order should have been affirmed in both proceedings. The judgment of the trial court affirming the action of the county superintendent is correct, and is affirmed.

AFFIRMED.

CAROL HART, A MINOR BY HER FATHER AND NEXT FRIEND, IVAN HART, APPELLEE, v. R. B. RONSPIES, APPELLANT.
146 N. W. 2d 795

Filed December 2, 1966. No. 36502.

1. **Appeal and Error.** An order affecting a substantial right made in a special proceeding is appealable. § 25-1902, R. R. S. 1943.
2. **Trial: Judgments.** The Summary Judgment Act authorizes an interlocutory summary adjudication of liability alone although there is a genuine issue of damages. § 25-1332, R. R. S. 1943.
3. **Judgments: Appeal and Error.** An interlocutory summary adjudication of liability alone is not appealable.

Appeal from the district court for Pierce County: FAY H. POLLOCK, Judge. Appeal dismissed.

Deutsch & Hagen, for appellant.

Brogan & Monen, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

SMITH, J.

The district court rendered a summary judgment for plaintiff on the issue of defendant's negligence. It reserved for trial, however, issues of contributory negligence under the comparative negligence statute, proximate cause, and damages. Defendant has appealed, but plaintiff challenges appealability.

There is no jurisdiction unless the judgment affected a substantial right. See, § 25-1902, R. R. S. 1943; Otte-

man v. Interstate Fire & Cas. Co., Inc., 171 Neb. 148, 105 N. W. 2d 583. The district court possesses authority to render a summary judgment, interlocutory in character, on the issue of liability alone although there is a genuine issue of damages. See § 25-1332, R. R. S. 1943. Such a judgment is simply an interlocutory summary adjudication. If a case is not fully adjudicated on motion, a hearing analogous to a pretrial conference for formulation of issues may be held. At the hearing the court may specify the facts that appear without substantial controversy, and such facts are established for the trial. See, § 25-1333, R. R. S. 1943; Maybury v. City of Seattle, 53 Wash. 2d 716, 336 P. 2d 878; 6 Moore's Federal Practice (2d ed.), § 56.20 [3.-2], p. 2751.

If there were no provision for appeal from an order affecting a substantial right made in a special proceeding, a litigant frequently would have an inadequate remedy. We think that the appeal provision was designed chiefly to prevent such a situation. See, Clarke v. Nebraska Nat. Bank, 49 Neb. 800, 69 N. W. 104; Turpin v. Coates, 12 Neb. 321, 11 N. W. 300. That purpose is compatible with the interlocutory summary adjudication which prevents vexatious delay in the trial process.

Ordinary burdens of trial do not affect a substantial right, and the remedy by appeal after a trial and a final judgment is adequate in the present case. See, Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614; Audi Vision, Inc. v. RCA Mfg. Co., Inc., 136 F. 2d 621, 147 A. L. R. 574; Maybury v. City of Seattle, *supra*. The appeal is therefore dismissed.

APPEAL DISMISSED.

LEONA ZAVORAL, APPELLANT, V. PACIFIC INTERMOUNTAIN EXPRESS, A CORPORATION, ET AL., APPELLEES.

146 N. W. 2d 796

Filed December 9, 1966. No. 36278.

1. **Trial: Appeal and Error.** The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error.
2. **Automobiles: Negligence.** Where a guest is injured as a result of the collision of the vehicle, in which he was riding, with another vehicle, and the evidence discloses that a jury question is presented as to the negligence of both drivers, the trial court should instruct the jury that the guest may recover against the driver of the other vehicle if the negligence of the driver of the other vehicle was the proximate cause of the accident and injuries, or if the negligent acts of the drivers concurred to cause the accident, or if the negligence of the guest's driver was the proximate cause of the accident and the negligence of the other driver contributed thereto.

Appeal from the district court for Kimball County: JOHN H. KUNS, Judge. Reversed and remanded.

Van Steenberg, Myers & Burke, for appellant.

Holtorf, Hansen & Kortum and Torgeson, Hurlbut & Knapp, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and C. THOMAS WHITE, District Judge.

WHITE, District Judge.

The plaintiff, Leona Zavoral, a passenger, brought suit against the defendants for personal injuries arising from a collision of the defendants' truck and a car being operated by plaintiff's husband. Zavoral v. Pacific Intermountain Express, 178 Neb. 161, 132 N. W. 2d 329, is a companion case in which the plaintiff's husband, Ronald Zavoral, brought suit for property damage and personal injuries alleged to have arisen from the same accident. The instant case was submitted to a jury on a

special verdict. The jury, in answer to specific questions, found that the defendant driver was guilty of negligence, but found that the negligence did not "amount to a proximate cause of the collision," and fixed no damages. From the jury's verdict and from the order denying the motion for judgment notwithstanding the verdict or, in the alternative for a new trial, the plaintiff appeals.

The plaintiff, in her petition in the trial court, alleged that she was a passenger in the vehicle operated by her husband, which was involved in a collision with a truck, owned by defendant Pacific Intermountain Express and operated by the defendant Naylor, at the intersection of U. S. Highway No. 30 and State Highway No. 29 in Kimball, Nebraska; and that she sustained personal injuries which were proximately caused by the negligence of defendant Naylor.

The amended answer admitted the collision, but alleged that the accident was proximately caused by specified acts of negligence of the plaintiff's husband. Defendants further alleged that the plaintiff and her husband were engaged in a "joint adventure"; that the negligence of plaintiff's driver was imputed to her; and that the negligence was more than slight. No evidence was offered as to "joint adventure," and the matter was not submitted to the jury.

The evidence, offered in the trial court with respect to the facts of the accident, is substantially the same as offered in the companion case of Zavoral v. Pacific Intermountain Express, *supra.* No purpose would be served by setting it out again. This court held in the companion case that the issues of the negligence of plaintiff's husband and of defendant Naylor presented a jury question. On review of the record in the instant case, we hold that a jury question is presented as to the alleged negligence of the plaintiff's driver and of the defendants.

The plaintiff assigns as error the giving of certain instructions by the trial court, and the failure to give cer-

tain other instructions. The plaintiff's first assignment of error relates to the giving of instruction No. 11. The instruction is set out in full:

"INSTRUCTION NO. 11. In this case, it is not necessary for you to determine whether Ronald Zavoral was or was not negligent in the operation and management of his vehicle, and no questions are submitted in this connection.

You may, however, consider his conduct and the extent to which he observed and met his responsibility to follow the rules of the road from the standpoint of its effect upon the defendant driver and his judgments with respect to his own driving, as one of the circumstances mentioned in the various instructions.

You may further consider the whole conduct of Ronald Zavoral during the time immediately before the collision in connection with the claim of defendants that such conduct constituted the sole proximate cause of the collision."

The plaintiff contends that instruction No. 11 does not submit the pleaded defense of the defendants, which was that the accident was proximately caused by the negligence of the plaintiff's husband, but allowed the jury to speculate on the *conduct* of *plaintiff's* driver and to determine that such conduct was the sole, proximate cause without finding that the plaintiff's driver was negligent. In instruction No. 2, the trial court, in a review of the defendants' answer, states that the defendants "claim that the collision was caused by the conduct of Ronald Zavoral," although the word "conduct" is not contained in the amended answer. The pleaded defense is negligence, which negligence was the sole, proximate cause of injuries to the plaintiff. The phrase "whole conduct" introduces an area of speculation which renders it impossible to determine upon what the jury based its findings. The instruction does not discuss the effect of the negligence of the defendant driver, whether it concurred with negligence of plaintiff's driver or proxi-

mately contributed to the cause of the accident and plaintiff's injuries, nor was the jury advised elsewhere in the instructions.

"It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and evidence, and such rule applies in cases wherein defendant pleads and adduces evidence that plaintiff's driver was negligent in certain specified particulars and that such negligence was the sole proximate cause of the accident and injuries." Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523.

Defendants assert that plaintiff may not complain of this instruction, since the trial court's pretrial order held as follows:

"II. The issues appear to be: * * * (5) In view of the fact that the defense contends that the conduct of Ronald Zavoral was the cause of plaintiff's injuries, it is hereby ordered that the conduct of Ronald Zavoral shall not be submitted or considered by the jury from the standpoint of its negligence, by (sic) only as a factor or circumstance in (sic) the issues of negligence and causation raised between the parties." Plaintiff did not file exceptions to the pretrial order.

Generally, the effect of a pretrial order is to control the subsequent course of the action, and unless the order is modified at the trial to prevent a manifest injustice, the court may exclude evidence on issues not stated in the pretrial order, and such issues need not be submitted to the jury. See Annotation, 22 A. L. R. 2d 599.

The pretrial order improperly restricted the issues to the extent that the defense of the negligence of a third party as the sole, proximate cause was not submitted, even though it was pleaded and the evidence justified its submission.

Where a pretrial order improperly restricts the issues, the parties are bound by it at trial and on appeal, where no objection has been made unless it does violence to

the issues raised by the complaint. Fowler v. Crown-Zellerbach Corp., 163 F. 2d 773.

Notwithstanding the pretrial order and the plaintiff's failure to move for its vacation and modification, the trial court was obliged to instruct on the issues raised by the pleadings and the evidence. As this case will have to be retried, a new pretrial order should be entered, correctly setting forth the issues as contained in the pleadings.

The plaintiff further assigns as error the failure of the trial court to instruct the jury that the plaintiff would be entitled to recover if there were negligence on the part of one driver which was the proximate cause of the accident, and negligence on the part of the other driver which proximately contributed to the accident. The trial court did define concurrent negligence in instruction No. 12, but did not inform the jury that if it found that the negligence of defendants and plaintiff's driver concurred to cause the accident, plaintiff should recover.

Barry v. Moore, 172 Neb. 57, 108 N. W. 2d 401, was an action in which a guest sued the driver of another car for personal injuries as a result of a collision between defendant's car and the car in which she was a passenger. The plaintiff alleged in her petition that the defendant was negligent in the operation of his car and that this negligence was the proximate cause of injuries which she sustained. The defendant alleged that the host driver was negligent and that his negligence was the cause of the collision and plaintiff's injuries. The alleged contributory negligence of the plaintiff was not supported by the evidence and was not submitted to the jury. The trial court did not instruct on the theory of concurrent negligence, nor was the jury informed that if the negligence of the host driver was the proximate cause of the accident and the negligence of the defendant's driver proximately contributed to the accident, plaintiff could recover. This court held the failure to so instruct to be reversible error, and remanded the

cause for a new trial. We deem this case to be controlling here.

The plaintiff assigns as error the giving of the fourth paragraph of instruction No. 12, which is as follows: "The circumstances surrounding a situation, including the completed conduct of a person, are conditions. Conduct is complete when its possible effect cannot be altered. Continuing conduct of a person which might be changed or adjusted in accordance with the situation should be considered as a possible cause rather than as a condition."

The plaintiff asserts that this instruction is not clear and not applicable to the facts in this case. The net effect of this instruction is to allow the jury to conclude that when the negligent acts of a party are placed in motion and he is powerless to avoid an accident or collision, the acts of negligence which cannot be changed or altered become a condition and not a cause. Under this instruction, the jury could have found the defendant driver negligent, but could have further found that since the defendant driver could not stop or turn to avoid a collision, his negligent acts were not a cause of the collision or plaintiff's injuries.

While it is true that an alleged cause of an accident may, in reality, be a condition, the acts of the defendant driver and of the plaintiff's husband are directly connected with the collision and the injuries. The factual situation does not justify the giving of this instruction. See Knuth v. Singer, 174 Neb. 182, 116 N. W. 2d 291.

The plaintiff assigns as error the trial court's instruction in the definition of proximate cause. This case must be remanded for retrial. We merely point out that this court has repeatedly defined proximate cause and has approved instructions relating thereto.

Finally, the plaintiff asserts that the trial court, as a matter of law, should have found that the defendants were negligent and that such negligence was the proximate cause of the injuries to the plaintiff, and that a

retrial should be limited to the question of damages. The relationship of the alleged negligence of each driver to the proximate cause of the collision and plaintiff's injuries has not been considered under proper instructions. This assignment is without merit.

The judgment of the trial court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

CONNIE K. GARTSIDE, APPELLEE AND CROSS-APPELLANT, V. ROBERT GARTSIDE, APPELLANT AND CROSS-APPELLEE.
146 N. W. 2d 777

Filed December 9, 1966. No. 36296.

1. **Divorce.** Condonation is ordinarily complete if there is a resumption of marital relations after alleged breach of marital duty.
2. ———. Condonation is forgiveness for the past upon condition that the wrong shall not be repeated. It is dependent upon future conduct, and a repetition of the offense revives the wrong condoned.
3. ———. Factors to be considered in an award of alimony or a division of property in a divorce case are the age and health of the parties; their earning ability; their relative conduct leading up to the divorce; the duration of the marriage; the social standing of the parties; the property of the parties and its value at the time of the divorce, its income-producing capacity, the manner in which it was acquired, and the respective contributions that each party has made thereto; the property of the parties and its value at the time of the marriage; and all other relevant facts and circumstances.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed as modified.

Lee A. Larsen and Thomas Stephens, for appellant.

Weber & Robinson, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and FLORY, District Judge.

WHITE, C. J.

This is a divorce action. From a decree awarding the plaintiff a divorce, child support in the sum of $40 per week, and alimony in the sum of $1,500, the defendant appeals. Plaintiff cross-appeals, praying for an award of additional alimony.

The parties, now in their twenties, were married March 24, 1961. They have two children, girls, who were born on November 9, 1961, and on April 26, 1963. They lived in Missouri on a farm until December 4, 1963, when they moved to Sarpy County, Nebraska. Defendant worked at two different jobs in Nebraska and was earning $108 per week at the time of the separation on January 13, 1965, the date the petition was filed. Defendant returned to Missouri, where at the time of the decree, he was engaged in farming on his father's farm. The petition alleges extreme cruelty as grounds for divorce. The parties' domestic troubles apparently began about July 1964. Plaintiff testified that during this period of time the defendant used vile and abusive language toward her; that he drank to excess and, as a result thereof, became abusive and violent, such conduct occurring in front of their two children; that he struck her; and that he unjustly accused her of improper conduct with another man. The plaintiff's testimony is undisputed.

The plaintiff testified as to different and specific instances. On July 23, 1964, at a birthday party for the plaintiff's brother-in-law, Francis Card, plaintiff awakened the defendant and asked him to go home, and he responded by calling her a series of extremely vile and abusive names which will not be repeated here. This undenied testimony was corroborated by two other witnesses who were present at the party. In August 1964, the defendant, after an argument, struck the plaintiff four or five times on the shoulder with his open hand. There was no direct corroboration of this incident, but the witness, Ethel Card, testified that the defendant ad-

mitted to her he had struck the plaintiff in this manner at the time in question. At another social gathering in October 1964, plaintiff testified that the defendant became intoxicated, stated he was going to vomit in one of the desk drawers in the house, and when plaintiff protested, he called her a vile and abusive name. This incident was corroborated by the witness, Roberta Card. The evidence shows that some of the incidents testified to by the plaintiff occurred in front of the children. Plaintiff also testified that the conduct of the defendant on these occasions and generally had destroyed the legitimate objects of matrimony and she could not continue living with him.

The evidence also shows that, despite this conduct, the plaintiff and defendant continued living together and having marital relations until on or about December 4. 1964. Subsequent to that time there is testimony that the defendant continued to call the plaintiff vile and obscene names. Plaintiff testified that the defendant's conduct in this respect had become progressively worse during this period of time. The witness, Francis Card, testified that in the month of December he was present when the defendant called the plaintiff vile names at their home. The evidence shows that on December 23, 1964, the defendant's birthday, there was a party at his home; that he arrived home in an intoxicated condition; and that when his wife asked him to wipe up some coffee he had spilled while unwrapping presents, he called her a vile and obscene name. This was in the presence of a number of people and the children of the parties. The use of the vile language and the other circumstances were corroborated by the witness, Ethel Card. The plaintiff testified that on January 12, 1965, the day before the filing of the petition in this matter, the defendant had accused her of running around with another man and had kicked her and pushed her back into the refrigerator. The witnesses, Ethel Card and Virginia Rees, both testified the defendant had admitted

to them that he had struck his wife on January 12, 1965, and did so because "he was mad, or else he was drunk." Other witnesses besides the plaintiff testified as to the violent temper of the defendant; that he became intoxicated in the presence of his wife and children; and that during such times he used vile and loud language and was abusive to his wife and anybody who was present. There is also evidence of other incidents, including physical abuse of the children, which we do not deem necessary to repeat here. All of this testimony stands undenied in the record by the defendant.

From the above review of the evidence it can readily be observed that there is ample testimony to support the charge of extreme cruelty. However, defendant's first contention is that plaintiff condoned the actions of the defendant. It is true that condonation is ordinarily complete if there is a resumption of marital relations after alleged breach of marital duty. Ross v. Ross, 174 Neb. 795, 119 N. W. 2d 495; Sewell v. Sewell, 160 Neb. 173, 69 N. W. 2d 549. The evidence does show that the parties continued marital relations until on or about December 4, 1964. The undenied testimony is that they did not have marital relations after that time. There appears, therefore, from the testimony, little question but that the actions of the defendant were condoned up until the first part of December 1964. However, the rule is that condonation is forgiveness for the past upon condition that the wrong shall not be repeated. It is dependent upon future conduct, and a repetition of the offense revives the wrong condoned. Workman v. Workman, 164 Neb. 642, 8 N. W. 2d 368; Waldbaum v. Waldbaum, 171 Neb. 625, 107 N. W. 2d 407; Anderson v Anderson, 89 Neb. 570, 131 N. W. 907, Ann. Cas. 1912C 1; Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808. As previously recited, the evidence clearly shows that the defendant continued his previous course of conduct and used vile and abusive language toward the plaintiff in December 1964. These acts, besides constituting ex-

treme cruelty themselves, revive the previous wrongs condoned. There is no merit to this contention.

Defendant's next contention is that subsequent to plaintiff's condonation and forgiveness there was not satisfactory evidence of corroboration to establish grounds for divorce. It is impossible to lay down any true and general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances. Workman v. Workman, *supra*. However, in this case, the evidence shows that the defendant, without provocation, continued to call the plaintiff vile and abusive names in the month of December 1964, after the cessation of marital relations. The witness, Ethel Card, testified as to the use of such language by the defendant while present at the party on December 23, 1964, and the witness, Francis Card, testified that he heard the defendant call the plaintiff vile and abusive names during the month of December 1964. It is also significant that the defendant did not deny this testimony. There is no merit to this contention.

We come to the conclusion, after a review of the record, that there is ample corroborated testimony establishing the plaintiff's charges of extreme cruelty and that the trial court's award of an absolute divorce to the plaintiff was correct.

The next contention of the defendant is that the award of child support in the sum of $20 per week per child is excessive. Plaintiff introduced no evidence as to the defendant's earnings at the time of trial. He is farming in Missouri. The children are under school age and are healthy. The only evidence relevant to this issue is that the total expenses for the support of the plaintiff and the two children were in the sum of $182.50 per month. The proper proportionate amount of this sum to be allocated to the support of the two children is for this court to determine. The substance of defendant's contention is that the amount awarded should be reduced to the approximate sum of $120 per month. We

agree. We determine that the proper amount of child support to be awarded in this case, under all of the circumstances, is the sum of $60 per month per child or a total of $120 per month.

The only remaining question is the plaintiff's cross-appeal from the allowance of alimony in the sum of $1,500 payable at the rate of $25 per month. Evidence in this respect is inadequate, particularly with reference to the valuation of the property of the parties. The property of the parties consisted of household goods and appliances, a 1959 Chevrolet automobile, farm machinery, equipment, and livestock located on the father's farm in Missouri, and a $10,000 life insurance policy. Plaintiff lists these items of property on two sheets of paper, exhibit Nos. 3 and 4 and places a value on each item. Plaintiff testified that the household goods had a total valuation of $565. The parties divided this property after their separation with the plaintiff receiving property of value in the neighborhood of $200. The plaintiff testified as to the different items of farm equipment, machinery, and livestock that the defendant had in Missouri and placed a total value thereon of $5,172. This includes the 1959 Chevrolet automobile valued at $475. The court found the cash value of the life insurance policy in the sum of $750 to which there is no objection in this appeal. Despite this testimony on the part of the plaintiff, she now contends that the court should add the sum of $3,200 in the valuation of the total property because of a probable increase from the eight dairy cows and twelve sows she listed as being owned by the defendant. The testimony of the plaintiff in this respect is pure conjecture and surmise, and the record is entirely devoid of any evidence as to valuation. The plaintiff, on being asked about the existence of 45 or 50 pigs, testified, "should have been, yes." There is no evidence as to an increase from the herd of 8 dairy cows or a valuation thereof. Although the record is not free from doubt, we come to the conclusion that the total value of the

parties' property at the time of the trial was between $5,000 and $6,000. The trial court made no finding as to valuation. The record also shows that the property owned by the defendant at the time of their marriage was of the approximate valuation of $3,800.

The parties left the farm in Missouri in December 1963. The farm machinery and equipment have remained on the farm and the cost and expenses of maintaining the livestock and any evidence as to depreciation of the farm equipment and machinery do not appear in the evidence.

The factors to be considered in an award of alimony or a division of property in a divorce case are the age and health of the parties; their earning ability; their relative conduct leading up to the divorce; the duration of the marriage; the social standing of the parties; the property of the parties and its value at the time of the divorce, its income-producing capacity, the manner in which it was acquired, and the respective contributions that each party has made thereto; the property of the parties and its value at the time of the marriage; and all other relevant facts and circumstances. Workman v. Workman, *supra*; Kroger v. Kroger, 153 Neb. 265, 44 N. W. 2d 475. We point out that this is not a case where a married couple has acquired, by their joint efforts, property over a long period of time. The parties here are young; the plaintiff was 22 years of age at the time of the trial. The marriage lasted about 4 years, and the value of the property they acquired by their joint efforts was comparatively small. The income and earning capacity of the defendant are not shown in the evidence. He is farming in Missouri on a farm owned by his father. The farm machinery, equipment, and livestock are necessary for the defendant's continued operation on the farm. It appears that both parties are in good health. It does appear that the defendant's conduct was responsible for the divorce, and this conduct was over a short period of time, consisting mainly of the

use of vile language against the plaintiff but did not injuriously affect her health. It also appears that the defendant will have a financial burden in the payment of child support which may increase as the years go on. The trial court awarded $1,500 in alimony payable at the rate of $25 per month. On a review of the record in this case we consider this award just and equitable under all of the circumstances.

For the reasons given, the decree of the district court is modified to provide for an allowance for child support in the sum of $60 per month per child or a total of $120 per month. The decree in all other respects is affirmed. Costs are taxed to the defendant, including an attorney's fee in the sum of $200 in this court.

AFFIRMED AS MODIFIED.

DOROTHY GENE (JEAN) LANGDON CONRY, APPELLEE, V. FRANCES RUTH LANGDON ET AL., APPELLANTS, IMPLEADED WITH CATHERINE DELPHINE KENNEDY ET AL., APPELLEES.
146 N. W. 2d 782

Filed December 9, 1966. No. 36314.

1. **Deeds.** To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that she could not understand and comprehend the purport and effect of what she was then doing.
2. ———. The one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact. However, the circumstances under which it was made, the condition of the grantor at the time, and the injustice to her and her heirs, if it is upheld, may be such as to cast upon the grantee the burden of going forward with the evidence to show that it is not tainted with undue influence but is the deliberate and bona fide act of the grantor.
3. ———. The undue influence which will void a deed is an unlawful and fraudulent influence which controls the will of the

donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

Robert T. Fortune and Leslie D. Carter, for appellants.

Dixon G. Adams, for appellee Conry.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and HASTINGS, District Judge.

HASTINGS, District Judge.

This is a partition action brought by Dorothy Gene Conry in which she seeks to confirm a five-ninths interest in the subject real estate in herself, and a two-ninths interest each in her sister Catherine Delphine Kennedy, hereinafter referred to as Delphine, and in her brother's wife Frances Ruth Langdon. Delphine and her husband failed to answer or to participate in the trial. Frances Ruth Langdon and her husband Thomas W. Langdon filed an answer admitting all allegations of the petition, and then later filed amended answers denying the full interest of the plaintiff, and alleging that a deed conveying a one-third interest from Pearl A. Langdon to her daughter Dorothy Conry was the result of undue influence exercised by the latter, and that the grantor was incompetent at the time of the execution. The trial court found generally for the plaintiff and confirmed the shares as set forth in the petition. Defendants Frances and Thomas W. Langdon bring this appeal attacking the judgment as being contrary to the law and not sustained by the evidence. For the purposes of this appeal, the plaintiff and appellee Dorothy Gene Conry will be referred to as Dorothy, and the defendants and appellants Frances Ruth Langdon and Thomas W. Langdon as Frances and Thomas, and Pearl A. Langdon as Mrs. Langdon.

Mrs. Langdon, a widow, was the mother of Dorothy, Delphine, and Thomas. As a result of their husband's and father's death in 1930 they became the fee owners of the east half of the southwest quarter and Government Lots 1 and 2 of the southwest quarter of Section 20, Township 13 North, Range 10 East, Sarpy County, Nebraska, Mrs. Langdon holding a one-third interest and each of the children a two-ninths interest. On January 14, 1942, Thomas conveyed his share in the real estate to Frances.

Frances and Thomas lived in Mrs. Langdon's house in Omaha from 1937 to 1965. They never paid her any rent, and although Mrs. Langdon also lived there until November of 1963, she had her own money, and as a matter of fact, according to Frances' testimony: "She bought the groceries and did some repair on the home and paid her drug bills and helped in ways like that." In November of 1963, Mrs. Langdon was accidentally burned, and from that time until her death on March 31, 1965, spent most of her time in Clarkson Hospital and in Booth Memorial Hospital, a nursing home.

On March 19, 1964, while confined in Booth Memorial Hospital, Mrs. Langdon executed and delivered to Dorothy a quit claim deed conveying all of her interest in the subject property. The deed was prepared and its signing acknowledged by Maurice F. Langdon, who was identified as Mrs. Langdon's attorney, and who bore some family relationship to her not explained in the record. The deed was duly recorded in Sarpy County the next day.

This action was commenced by the filing of the petition on February 9, 1965. Dorothy, the plaintiff, was represented by Maurice F. Langdon, who died on February 24 or 25, 1965.

At the trial in the district court, evidence was adduced from two nurses, proving execution and delivery of the deed, and making out a prima facie case of mental competency on the part of Mrs. Langdon.

Frances called as witnesses herself and two of her adult children. They all testified that Mrs. Langdon was childish, senile, and forgetful, but that she knew all of them. There was also evidence to the effect that Dorothy handled Mrs. Langdon's affairs during the 2 years preceding her death.

Evidence introduced by Dorothy included testimony by her, her two children, two nurses, and Mrs. Langdon's dentist and podiatrist. They all testified that Mrs. Langdon was aware of her surroundings, strong-willed, and capable of managing her affairs.

This being an appeal in an equity action, the statute requires this court, in determining questions of fact, to reach an independent conclusion without reference to the findings of the district court. However, if there is an irreconcilable conflict in a material issue, this court will, in determining the weight of the evidence of witnesses who appeared in court to testify, consider the fact that the trial court observed them and their manner of testifying.

In Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645, this court said: "As stated in Little v. Curson, 114 Neb. 752, 209 N. W. 737: 'Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity.' * * * 'In order to vacate a deed on the ground of mental incapacity of the grantor, it is necessary to show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interest. The mere circumstances that the mental powers have been somewhat impaired by age or disease is not sufficient, if the maker of the deed still retains a full comprehension of the meaning, design and effect of his act, * * *.' Brugman v. Brugman, 93 Neb. 408, 140 N. W. 781." Suffice to say that Frances has fallen short of meeting this burden, and to the contrary, the evidence affirmatively

supports a finding of competency on the part of Mrs. Langdon.

The next issue is the question of undue influence. The general rule is that the burden of proof in any cause rests upon the party who asserts the affirmative of an issue, in this case, on Frances. However, when a party upon whom the burden rests establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence devolves upon the grantee to show the bona fides of the conveyance. "In any such case where confidence is known, or may reasonably be expected to exist as a fact, where it is of a legal, moral, social, domestic, or personal character, equity will scrutinize the transaction critically, and especially so where age, infirmity, and instability are involved, to see that no inequitable action has been taken and no injustice has occurred. * * * When a party seeking to set aside a conveyance because of undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the party seeking to sustain such a conveyance to overcome such presumption." Cunningham v. Quinlan, 178 Neb. 687, 134 N. W. 2d 822.

"Not all influences will avoid a deed. Influences which arise out of the affection, confidence and gratitude of a parent to a child, and inspire a gift, are natural and lawful influences and will not render such a gift voidable. It is otherwise, however, where influences have been such as to confuse the judgment and control the will of the donor. If the act done is not the act of the donor himself but is simply carrying out the will of another, then that is an undue and unlawful influence and will avoid acts done on account thereof." Broeker v. Day, 124 Neb. 316, 246 N. W. 490.

In this case there is a total lack of evidence showing

any urging by Dorothy to secure the execution of the deed. As a matter of fact, the evidence shows that the transaction was handled exclusively by Mrs. Langdon and her attorney. There is evidence that in return for the conveyance, Dorothy was to sell the property if it became necessary to do so, in order to pay her mother's medical bills. Frances complains that Dorothy has paid none of these bills. However, the obvious answer to that is found in the testimony of Dorothy, in response to questions put to her by Frances' attorney. "A. I used her cash as far as it would go and now I don't have any, very little. Q. When you accepted that deed you accepted it on the theory that you were going to sell the property and pay your mother's expenses, didn't you? A. When the deed was signed I promised my mother that we would hold onto the property as long as possible, it was important to her. This last piece of land was very important to her. Q. Then what were you to do with the money when it was sold? A. Well, as I have said before, I would have used the money for her care, as long as she needed it, anything left over was to be mine. Q. And so with that in mind you filed that partition action, is that correct? A. We filed a partition action to get something going so, I had hoped, that we could have gotten this all done before my mother passed away, it was unfortunate Monty died when he did, I mean, I just did what people advised me to and what my mother wanted me to." It appears from the evidence that what Dorothy has done was to take the necessary steps to carry out the express wishes of her mother, and that she has satisfactorily rebutted any presumption of undue influence which might have arisen by reason of their personal relationship.

We therefore find that Mrs. Langdon was competent to execute the deed and was not subjected to undue influence, and Dorothy was entitled to have the shares in the real estate confirmed as alleged in her petition. The trial

court having come to the same conclusion, its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACK CHARLES DILORENZO, APPELLANT.

146 N. W. 2d 791

Filed December 9, 1966. No. 36319.

1. **Courts.** The municipal court of the City of Omaha has criminal jurisdiction over territory coextensive with the boundaries of the justice of the peace district in which such court is located.
2. **Automobiles: Criminal Law.** It is not necessary that there be direct evidence identifying a defendant as being the driver of an automobile. It is sufficient if the circumstances, when considered together, warrant the inference of fact that the defendant was driving the automobile in question.
3. ———: ———. In a prosecution under section 39-7,107.02, R. R. S. 1943, for willful reckless driving, the conscious and intentional driving which the driver knows, or should know, creates an unreasonable risk of harm to others is sufficient to show "willful disregard for the safety of persons or property" under the statute.
4. **Statutes: Criminal Law.** Where a statute states the elements of a crime, it is generally sufficient in a complaint to describe such crime in the language of the statute.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Paul E. Watts, for appellant.

Herbert M. Fitle, Walter J. Matejka, Charles A. Fryżek, Gary P. Bucchino, Raymond Gaines, Richard Dunning, John Gutowski, and John Abbott, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and HASTINGS, District Judge.

WHITE, C. J.

This is a prosecution for willful reckless driving under section 39-7,107.02, R. R. S. 1943, which provides in sub-

stance, that it shall be unlawful for any person to operate a motor vehicle in such a manner as to indicate a willful disregard for the safety of persons or property. The complaint was filed in the municipal court of the City of Omaha, Nebraska, defendant was tried and convicted, error proceedings were taken to the district court for Douglas County, Nebraska, which were dismissed, and the defendant now appeals to this court.

Evidence on behalf of the State shows that on December 6, 1965, about 11 o'clock p.m., an Omaha police officer was parked in the vicinity of Ninety-third and Dodge Streets in Omaha, Nebraska. The city limits of Omaha, Nebraska, are Ninety-sixth and Dodge Streets. The officer, while parked, heard a commotion and tires squealing and saw two cars coming over the hill in the vicinity of Ninetieth and Dodge Streets. One of these cars was a 1965 Chevrolet. As the car passed, the officer left his parked position, proceeded after this 1965 Chevrolet, and turned on his blinker lights and left spotlight. At that time the 1965 Chevrolet was at about Ninety-sixth and Dodge Streets. When the officer reached Ninety-sixth and Dodge Streets, he turned on his siren and proceeded to chase the 1965 Chevrolet automobile to One Hundred Thirty-second and Dodge Streets at speeds between 95 and 100 miles per hour. Three cars were passed during this period of the chase. The officer identified this 1965 Chevrolet as having three round tail lights on the left and three on the right side and testified that those were the lights he followed all of the time until the chase ended. The car turned south at One Hundred Thirty-second and Dodge Streets to Pacific Street, turned west at One Hundred Thirty-second and Pacific Streets, and proceeded on to a farm yard in the vicinity of One Hundred Seventy-sixth and Pacific Streets. The officer pulled into the farm yard, found the 1965 Chevrolet parked there with the left door open, and found a female occupant in the car. He looked behind a barn, heard a commotion in a corn field, flashed

his flashlight, and discovered the defendant. The officer testified as follows: "I walked up and took him by the arm and said he was under arrest. He said 'What for?' and I said 'I chased you from 93rd and Dodge.' And again he said 'What for?' and I said that I had chased him from 93rd and Dodge, and he said 'I thought you were another car.' " The officer further testified that in his conversation with the defendant the defendant told him that he thought a car was chasing him. The officer asked him, " 'What do you mean by a car?' " The defendant answered, " 'The car along by him on Dodge.' " The officer further testified that the defendant told him there were a couple of boys who wanted to drag race at first; that he tried to get away from them; and that he thought they were going to pull him over and beat him up. The officer advised the defendant that he was under arrest and the record shows that all during the period of the conversation with the officer, during and after the arrest, the defendant did not deny or assert that he was not driving the 1965 Chevrolet automobile.

Defendant first contends that there is insufficient proof to show that the defendant was operating the motor vehicle. In the State's evidence, it is true that there is no direct evidence identifying the defendant as being at the wheel or driving the 1965 Chevrolet. But, the evidence is that when the officer pulled up into the barn yard, the left front car door was open; that the defendant was in a corn field behind a barn; that when the officer told the defendant he had chased him from Ninety-third and Dodge Streets, the defendant responded, " 'I thought you were another car' "; that defendant further admitted that a car was chasing him; that the car that was chasing him was along by him on Dodge Street; and that he tried to get away from a couple of boys who wanted to drag race. These are sufficient circumstances to warrant the inference of fact that the defendant was driving the 1965 Chevrolet automobile. At no time did the defendant deny to the officer

that he was driving the car. The defendant argues that the officer changed his testimony to the effect the vehicle he was following was a hard top rather than a convertible to which he had first testified. But, the officer did testify that he only momentarily lost sight of the automobile during the entire chase and was never further than 5 blocks away from it. The defendant argues various other matters, such as the officer's visibility being impaired at different points in the chase, a change in his testimony as to identification of a 1965 Pontiac that he initially observed along with the defendant's automobile at Ninety-third and Dodge Streets, and other matters. Suffice to say these arguments all relate to the weight and credibility of the officer's testimony and do not bear on the sufficiency of his evidence to sustain this conviction. There is no merit to this contention.

Defendant's next conclusion is that the municipal court of Omaha, Nebraska, did not have jurisdiction of the case. The chase began at Ninety-sixth and Dodge Streets, which is the city limits, continued west on Dodge Street, then south to Pacific Street, and then west on Pacific Street, all in Douglas County, Nebraska. Section 26-118, R. R. S. 1943, provides that the municipal court shall have concurrent jurisdiction with the county court in criminal cases in which the punishment does not exceed 6 months' imprisonment or a fine of $500, or both. Specifically bearing upon the question of the territorial jurisdiction of the municipal court of Omaha is section 26-116, R. R. S. 1943. That statute provides that the municipal court in cities of the metropolitan class shall "have jurisdiction over territory coextensive with the boundaries of the justice of the peace districts in which said courts are located * * *." Section 5-106, R. R. S. 1943, shows the County of Douglas as being justice of the peace district No. 15. These statutes clearly establish jurisdiction of the municipal court of the City of Omaha to hear and determine this case, even assuming that the evidence establishes that it occurred entirely outside of

the city limits of the City of Omaha, Nebraska. But, the defendant contends that these statutes are unconstitutional insofar as they attempt to give jurisdiction to the Omaha municipal court outside of the confines of the city limits of the City of Omaha. Defendant cites as his authority for this position: State ex rel. Wright v. Brown, 131 Neb. 239, 267 N. W. 466; and State ex rel. Woolsey v. Morgan, 138 Neb. 635, 294 N. W. 436. In both of these cases the question was the constitutionality of the statute abolishing justice of the peace courts within Lancaster County and outside the city limits of Lincoln, and sustituting therefor the municipal court of the City of Lincoln. The court held both statutes unconstitutional and preserved jurisdiction of the justice of the peace courts in Lancaster County, Nebraska. In neither case was the territorial jurisdiction of the municipal court of Lincoln, or Omaha, as established by statute, challenged. These cases do not support the contention of the defendant.

Defendant next contends, in substance, that the evidence of speed alone is not sufficient to sustain the conviction. We agree that speed alone does not amount to recklessness in the operation of an automobile. But, the real question presented is whether the particular speed is dangerous under the surroundings and attendant circumstances of the particular case. We feel, in this case, that there are facts clearly sufficient to establish a manner of driving which evidenced a disregard for the safety of persons and property sufficient to support the judgment of the court. The officer testified that he traveled at a speed of 95 to 100 miles an hour. The evidence discloses that the speed of the defendant was highly excessive; that he passed at least three automobiles; that he continued this course of conduct on a heavily traveled public highway at nighttime; and that under the circumstances his actions constituted a jeopardizing of his own life, the life of his companion in the car, and other people lawfully traveling on the highway.

There is no merit to this contention.

The defendant next contends that the complaint charges him with committing an offense at or near 17606 Pacific Street, while the evidence shows the ofense occurred on West Dodge Street, a distance of about 4 miles from where the arrest occurred. The evidence shows that the defendant was pursued from Ninety-third and Dodge Street continuously on West Dodge Street, south to Pacific Street, and then west to the point of arrest. Under these circumstances it is reasonable to designate the place where the offense was committed as being at or near the point of arrest. We further point out that the designation of the exact address of the place of the commission of the offense was unnecessary and was surplusage in the complaint. The complaint charged the statutory elements of the crime, and this is sufficient. See, Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717; Goff v. State, 89 Neb. 287, 131 N. W. 213. A complaint must inform the accused with reasonable certainty of the charge against him in order that he may prepare his defense. It is clear that the complaint in this case sufficiently apprised the defendant of the charges against him and was more than necessary as required under the law.

The judgment of the district court in overruling the petition in error was correct and is affirmed.

AFFIRMED.

GLEN D. MARTINDALE, APPELLANT, V. STATE OF NEBRASKA, DIRECTOR OF MOTOR VEHICLES, APPELLEE.

147 N. W. 2d 6

Filed December 9, 1966. No. 36323.

1. **Pleading.** A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.

2. **Automobiles: Criminal Law. The validity of a prior judgment of conviction of the operator of a motor vehicle for traffic violations, which judgment has been duly certified in regular form and sent to the Director of Motor Vehicles with nothing appearing thereon indicating invalidity, cannot be collaterally attacked in an appeal to review mandatory and ministerial action of such director in revoking the license of such person to operate a motor vehicle in this state.**

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

W. H. Kirwin and Neal D. Youmans, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and FLORY, District Judge.

SPENCER, J.

This is an appeal from the sustaining of the State's demurrer to the petition on appeal of Glen D. Martindale from an order of the Director of Motor Vehicles revoking his operator's license.

A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. Central Nebraska Public Power & Irr. Dist. v. Walston, 140 Neb. 190, 299 N. W. 609.

There is no dispute as to the pleaded facts. The operator's license of appellant was ordered revoked on October 22, 1965, because of an accumulation of 12 points. Included in those points were two resulting from a conviction on February 5, 1964, for operating a motor vehicle on January 21, 1964, when he did not have an operator's license in his possession.

On June 27, 1963, the Director of Motor Vehicles issued an order revoking appellant's license. On that occasion, appellant secured a restraining order in the district court for Scotts Bluff County and the revocation

was held in abeyance pending trial. While the action was pending, appellant's license expired and he was unable to secure a renewal. On November 1, 1963, a judgment was entered in the district court for Scotts Bluff County nullifying the order of revocation. A copy of that judgment was transmitted to the Director of Motor Vehicles. On January 9, 1964, the director issued a letter to effectuate the judgment of November 1, 1963. Appellant alleges that this letter was not received by him until after January 21, 1964. On that day, he was arrested for driving without having an operator's license in his possession. Appellant applied for and received an operator's license subsequent to his arrest on January 21, 1964. His conviction on February 5, 1964, resulted in a loss of two points pursuant to section 39-7,128, R. S. Supp., 1965. Subsequently, and before October 22, 1965, appellant accumulated an additional 10 points, and on that date the Director of Motor Vehicles revoked his operator's license. This the director was required to do. Section 39-7,129, R. S. Supp., 1965, provides in part: "* * * whenever it shall come to the attention of the director that * * * any * * * person has, as disclosed by the records of such director, accumulated a total of twelve or more points within any period of two years, as set out in section 39-7,128, the director shall summarily revoke (1) the license and privilege of such person to operate a motor vehicle in this state * * *."

Appellant challenges the propriety of assessing two points for his failure to have an operator's license in his possession on January 21, 1964, alleging that the failure was due entirely to an unreasonable delay on the part of the Director of Motor Vehicles of the State of Nebraska in issuing the order rescinding the previous order of revocation. Until this was done, appellant was not able to secure a current operator's license. Appellant asserts that the two points assessed as the result of this conviction are therefore wrongfully charged to his operator's license, and that in justice and equity they

should be eliminated. Appellant urges that in equity that which should have been done must be considered as though it were actually done. If this were true, then appellant's point total would be 10 rather than 12, and his license would not be subject to revocation. There is no merit to appellant's contentions.

Conceding an unreasonable delay on the part of the Director of Motor Vehicles, appellant was not without remedy. He had available the right to an appropriate action to compel the director to act, assuming the delay to be unreasonable. He was aware that he was not privileged to operate a motor vehicle on the public highways of this state until he secured a current operator's license. § 60-413, R. R. S. 1943. Instead of resorting to proper legal procedure, he knowingly flaunted the law.

This case is controlled by Bradford v. Ress, 167 Neb. 338, 93 N. W. 2d 17, in which we held: "The validity of a prior judgment of conviction of the operator of a motor vehicle for traffic violations, which judgment has been duly certified in regular form and sent to the director of motor vehicles with nothing appearing thereon indicating invalidity, cannot be collaterally attacked in an appeal to review mandatory and ministerial action of such director in revoking the license of such person to operate a motor vehicle in this state."

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WESLEY BRUNS, APPELLANT.

146 N. W. 2d 786

Filed December 9, 1966. No. 36364.

1. **Constitutional Law.** Article I, section 11, of the Constitution of the State of Nebraska, provides that in all criminal prosecu-

tions the accused shall have the right to a speedy public trial.

2. ———. No general principle fixes the exact time within which a trial must be had to satisfy the requirement of a speedy trial.

3. ———. The interpretation of the constitutional provision with reference to a speedy trial is for the court to determine, independent of statute.

4. ———. Whether a defendant is accorded a speedy trial, within the meaning of the constitutional provision, must be determined in the light of the circumstances of each particular case as a matter of judicial discretion.

5. ———. It is the general rule that an accused must assert his constitutional right to a speedy trial by some affirmative act in court, that acquiescence or consent to delay may constitute a waiver of right to a speedy trial, and that a demand for trial, resistance to postponement, or some other effort to secure a speedy trial must be made by an accused to avoid waiver of the right to speedy trial and to entitle him to a discharge on the ground of delay, at least when the accused has been admitted to bail.

6. **Trial: Criminal Law.** The rule requiring that a cautionary instruction as to the weight to be given to the testimony of informers, detectives, or other persons employed to hunt up testimony against an accused is not applicable to public officers who are performing a public duty required of them by statute.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Fisher & Fisher, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and FLORY, District Judge.

WHITE, C. J.

Defendant was convicted in the district court of driving an automobile while under the influence of intoxicating liquor. He appeals, contending he was denied the right to a speedy public trial under Article I, section 11, of the Constitution of the State of Nebraska, and for failure of the court to give a cautionary instruction with reference to the state patrolman's testimony in the case.

Defendant was arrested by a Nebraska safety patrolman on December 19, 1964. A complaint charging drunken driving was filed in county court on December 21, 1964. On the same date, December 21, 1964, the defendant was brought before the county judge, the complaint was read to him, and he pleaded not guilty. At this time trial was set for January 15, 1965, at 10 a.m., and the defendant was released on his own recognizance. The case was not tried on January 15, 1965. On April 16, 1965, the county court issued a bench warrant for the defendant's arrest. The bench warrant contained findings to the effect that the defendant had consulted an attorney; that he employed such attorney as counsel in the matter; and that he failed to reply to the requests of his counsel and of the county attorney to appear in court for trial. The defendant was arrested and brought before the county court on April 23, 1965. On April 28, 1965, the defendant filed a motion to discharge in county court. In this motion the defendant states he appeared for trial on January 15, 1965, in the county court, and "That he was informed that no one in the County Court knew anything about the matter and that he was not required to remain longer." In this motion he states, in substance, that a material witness was not now available to testify for him but was present and available for trial on January 15, 1965.

The defendant was tried and convicted on May 3, 1965, appealed to the district court where, prior to trial, he filed a motion and affidavit for discharge making substantially the same allegations and statements as he did in support of his motion for discharge in county court. These motions were overruled. He was tried in district court, convicted and sentenced, and now appeals to this court.

Article I, section 11, of the Constitution of the State of Nebraska, provides: "In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury * * *." Section 29-1203, R.

R. S. 1943, states as follows: "If any person indicted for any offense, who has given bail for his appearance, shall not be brought to trial before the end of the third term of the court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, * * *." Section 24-505, R. R. S. 1943, provides that it is the duty of the county judge to hold a regular term of court at 9 o'clock a.m. on the first Monday of each calendar month, for the trial of civil cases. The defendant was arrested on December 19, 1964, and charged on December 21, 1964. Since he was tried on May 3, 1965, it is argued that more than four regular terms of county court had passed without a trial and defendant should be discharged. Defendant contends he is entitled to an absolute discharge because of these two statutes. There is obviously no merit to this contention. The statute by its terms is limited to terms of court for the trial of civil cases. It attempts to set no terms of court for the trial of criminal cases and by its language is specifically limited to the trial of civil cases. There is no statute fixing criminal terms in county court, and the record is devoid of any action of the county court fixing terms of court for the trial of criminal cases. We are cited no authority, nor can we find any, to the effect that a term of court for civil cases applies to the trial of cases on a criminal docket. There is no merit to this contention.

We are, therefore, required to determine whether the defendant was accorded a speedy trial under the constitutional provision, independent of any statutory guide. The rule in both federal and state jurisdictions is stated in 22A C. J. S., Criminal Law, § 467(4), p. 24, as follows: "Accordingly, no general principle fixes the exact time within which a trial must be had to satisfy the requirement of a speedy trial. The right to a speedy trial is necessarily relative; it is consistent with delays, and whether such a trial is afforded must be determined in

the light of the circumstances of each particular case as a matter of judicial discretion." After quoting from the above authority, our court in Maher v. State, 144 Neb. 463, 13 N. W. 2d 641, stated as follows: "As stated in Critser v. State, 87 Neb. 727, 127 N. W. 1073: 'There is room for the exercise of sound discretion on the part of the trial court, always bearing in mind that the right to a speedy trial is the constitutional right of any citizen who is accused of crime.' The legislature of our state has interpreted the Constitution on the matter of a speedy trial by fixing what, in certain cases and under certain conditions, is to be regarded as a maximum time within which a defendant must be tried. The interpretation of this constitutional provision is for the court, but since the time fixed by the legislature is not unreasonable, we adopt it as our own. The defendant, having failed to bring himself within the provisions thereof, is not entitled to be discharged under its terms. *But the legislature has not undertaken to fix any minimum time in such matters. What is a fair and reasonable time in each particular case is always in the discretion of the court. No hard and fast rule can be applied in all cases.*" (Emphasis supplied.) In determining this question we are aided by other rules. This court in Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649, quoted from Shepherd v. United States, 163 F. 2d 974, in holding that the right of an accused to discharge for failure to receive a speedy trial is a personal right which may be waived, and it ordinarily is waived if accused fails to assert his right by making a demand for trial, by resisting a continuance, by going to trial without objection that time limit had passed, or by failing to make some effort to secure a speedy trial. In the Svehla case, the court said in passing upon the facts in that case: "We fail to find in the record any protest or objection made on the part of the defendant until he filed his plea in abatement on September 19, 1958. This plea in abatement refers to a 'speedy trial.' We fail to find in the record any request

by the defendant for an immediate trial." This holding follows the general rule stated in 22A C. J. S., Criminal Law, § 469, p. 37, as follows: "It is the general rule, however, * * * that accused must assert his constitutional right to a speedy trial by some affirmative act in court, that acquiescence or consent to delay may constitute a waiver of right to a speedy trial, and that a demand for trial, resistance to postponement, or some other effort to secure a speedy trial must be made by accused to avoid waiver of the right to speedy trial and to entitle him to a discharge on the ground of delay, *at least when accused has been admitted to bail,* or is not within the custody of the court." (Emphasis supplied.) This rule, of course, would not apply if we were dealing with a situation where there was an absolute statutory right to discharge. But, as we have said, there is no applicable statute in this case. And, also, the burden of proof is upon the defendant to show that there has been a delay which is unreasonable or beyond the time fixed by statute. 22A C. J. S., Criminal Law, § 470, p. 44; State v. Patterson, 126 Kan. 770, 271 P. 390.

With these rules in mind, we examine the evidence. The defendant was at liberty on his own recognizance. During this time we fail to find in the record any protest or objection or any action taken on the part of the defendant to secure a trial until he filed his motion for discharge on April 28, 1965. He made no application for trial of the case and took no action in the matter until after he was arrested on a bench warrant issued on April 23, 1965. Standing uncontradicted in the record is the finding of the county judge that the defendant had counsel and failed to respond to requests of his counsel and the county attorney to appear for proceedings in the case. His affidavit states that he appeared in county court for trial on January 15, 1965, and "That he was informed that no one in the County Court knew any thing about the matter, and defendant was not required to remain longer." His motion and affidavit are silent

as to the identity of the person or persons who so informed him. For aught the record shows, this information could have been given him by any spectator or some person who happened to be present not identified by the defendant. It is significant that his affidavit does not state that the county judge, or somebody in an official capacity, gave him the information that he states in this affidavit. If he had been officially advised by the county judge, before whom he had appeared on December 21, 1964, that he did not need to remain longer, surely his affidavit would have supplied this information. At the least it would seem that the county judge could not have told him that no one in the county court knew anything about the matter. The determination of this matter is addressed to the sound judicial discretion of the court. We come to the conclusion that there is no showing here of an abuse of discretion on the part of the county court or the district court in denying the defendant his discharge. This contention is without merit.

The defendant claims prejudice because of the absence of a material witness whom he states was present at the time the case was originally set for trial on January 15, 1965. He states that on information and belief he believes she has been committed to the Nebraska State Hospital and has not been discharged. There is no showing to the court as to the nature of her testimony or what her evidence would be. The name of the witness does not appear. By defendant's own affidavit these matters are left to conjecture and speculation. Furthermore, there is no showing that this witness was not subject to process and could not have been produced for trial on May 3, 1965. The evidence further discloses that the defendant and his companion in the automobile he was driving at the time he was arrested both testified in the case. The record further shows that he produced witnesses who were present with him at a bar before he left on the trip during which he was arrested. In the ab-

sence of some showing, we fail to see how the testimony of these witnesses could be other than corroborative of the testimony that was adduced in the case. A like situation was presented in Maher v. State, *supra,* in which this court held that the testimony to be produced by witnesses which the defendant claimed were not available for trial, was only corroborative in nature and therefore their absence was not prejudicial. As stated in that case, it can hardly be conceived that every witness a defendant may desire may be available at any one time. It is obviously impossible for a court to set a date for trial, in all cases, where all of the witnesses for both parties will be present. The record shows that no process was issued for the production of this witness and at no time did the defendant move for a continuance so that this testimony could be procured. Under the circumstances, we do not feel that the defendant was prevented from having a fair trial and we find that the trial court in no way abused its discretion in this respect.

The last contention of the defendant is that the court failed to give a requested instruction cautioning the jury on the weight to be given to the testimony of the Nebraska safety patrolmen who testified in the case. A cautionary instruction, when requested, is required where informers, detectives, or other persons employed to hunt up testimony against an accused are called to testify against him. Kastner v. State, 58 Neb. 767, 79 N. W. 713; Sandage v. State, 61 Neb. 240, 85 N. W. 35, 87 Am. S. R. 457. This rule, however, is not applicable to public officers who are performing a public duty required of them by the statute. McCartney v. State, 129 Neb. 716, 262 N. W. 679; Keezer v. State, 90 Neb. 238, 133 N. W. 204; Trimble v. State, 118 Neb. 267, 224 N. W. 274; Nelson v. State, 118 Neb. 812, 226 N. W. 438. Clearly, the three patrolmen of the Nebraska Safety Patrol who testified upon the trial of this case were public officers who were required to and were per-

forming a public duty at the time and place in question. There is no merit to this contention.

Other assignments of error are not argued or discussed and will not be considered. The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST A. ADAMS, APPELLANT.

147 N. W. 2d 144

Filed December 16, 1966. No. 36307.

1. **Criminal Law.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Grand Juries: Criminal Law.** An allegation in a plea in abatement that members of the negro race were excluded from service on the grand jury is not sufficient as against a demurrer unless intentional or systematic discrimination against the members of the defendant's race is alleged.
3. ———: ———. The only objection to the grand jury which can be made by a plea in abatement is to show that the jurors lacked the positive qualifications demanded by law.
4. **Bribery.** Section 28-708, R. R. S. 1943, relating to the attempted bribery of a public officer is not invalid as vague and indefinite.
5. **Indictments and Informations.** An information or indictment must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense.
6. ———. It is generally sufficient to allege the crime in the language of the statute. It is not necessary to state the detailed particulars of the crime in the meticulous manner prescribed by the common law.
7. **Criminal Law: Trial.** The right to a separate trial now depends upon a showing that prejudice will result from a joint trial.
8. **Conspiracy.** Where there is proof of a conspiracy, the acts and declarations of a conspirator in furtherance of the conspiracy

are the acts and declarations of all and may be admitted in evidence against the other conspirators.

9. ———. The fact of the conspiracy may be proved by circumstantial evidence and the order of proof is a matter within the discretion of the trial court.

10. **Witnesses: Evidence.** A witness who testifies from an independent recollection may refresh his recollection by referring to an original memorandum or a copy prepared by himself or another.

11. ———: ———. The manner in which a witness may be examined is within the sound discretion of the court.

12. **Criminal Law: Trial.** An instruction that the jury cannot draw any inference from the fact that a defendant did not testify is not erroneous.

13. **Juries: New Trial.** A motion for new trial for alleged misconduct of a juror is addressed to the sound discretion of the trial court.

14. **Grand Juries: Criminal Law.** As a general rule a verdict will not be set aside for reasons that would be sufficient to disqualify a juror on a challenge for cause, which existed before the jury was sworn but which was unknown to the accused until after the verdict, unless it appears from the whole case that the substantial rights of the accused were materially affected by the fact that the juror served in the case.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Thomas P. Kelley, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ., and MANASIL and HASTINGS, District Judges.

BOSLAUGH, J.

The defendant, Ernest A. Adams, was convicted of soliciting, proposing, or agreeing to receive a bribe in violation of section 28-708, R. R. S. 1943. His motion for new trial was overruled and he has appealed.

This case arose out of an application to rezone a tract of land at Eighty-first Street and Farnam Drive in

Omaha, Nebraska. The application was first presented to the planning board and then submitted to the city council. The defendant was a member of the city council and voted for the rezoning. The State's theory of the case is that the defendant, in conspiracy with others, solicited, proposed, and agreed to receive a bribe in the amount of $5,000 for a favorable vote on the rezoning application.

The defendant, who was charged by indictment, filed a lengthy plea in abatement attacking the indictment and the proceedings of the grand jury. The trial court sustained a demurrer to the plea in abatement. The defendant contends that the demurrer should have been overruled because the plea in abatement alleges that members of the negro race were excluded from service on the grand jury; that six of the grand jurors had signed recall petitions against mayor James J. Dworak; and that one grand juror had answered a questionnaire by stating: "Made up my mind from newspapers."

The demurrer to the plea in abatement was properly sustained. The defendant does not claim intentional or systematic discrimination or exclusion of the members of his race from the grand jury. See 24 Am. Jur., Grand Jury, § 27, p. 851. In this state the only objection to the grand jury which can be made by a plea in abatement is to show that the jurors lacked the positive qualifications demanded by law. Krause v. State, 88 Neb. 473, 129 N. W. 1020, Ann. Cas. 1912B 736.

The defendant contends that the statute under which he was charged is so vague and indefinite that it is invalid. Section 28-708, R. R. S. 1943, provides: "Whoever offers or attempts to bribe a public officer and every public officer who solicits a bribe or proposes or agrees to receive a bribe in any case shall be fined in a sum not exceeding five hundred dollars nor less than three hundred dollars, and shall be imprisoned in the Nebraska Penal and Correctional Complex for the period of one year."

We think the meaning of the statute is clear and definite. The Legislature has provided that the attempted bribery of a public officer or the solicitation or agreement to receive a bribe by a public officer shall be a felony. McMartin v. State, 95 Neb. 292, 145 N. W. 695.

The defendant points out that other sections relate to specified circumstances under which attempted bribery or the solicitation of a bribe is only a misdemeanor. These sections do not have the effect of making section 28-708, R. R. S. 1943, vague and indefinite even though it may be possible that a particular act may be punishable under more than one section of the law.

The indictment against the defendant originally contained three counts. The first count charged that from June 3, 1964, to September 28, 1964, the defendant as a city councilman conspired with Ronald J. Abboud, Carville R. Buttner, and Steve Novak to accept a bribe for a favorable vote on a rezoning matter. The second count charged that the defendant, as a member of the city council, received $5,000 on September 15, 1964, for a favorable vote on a rezoning matter. A demurrer to these counts was sustained.

The third count, upon which the defendant was convicted, charged that the defendant, from June 3, 1964, to September 28, 1964, "* * * being a City Councilman of the City of Omaha, Nebraska, did unlawfully solicit, propose, or agree to receive a bribe, to-wit: the sum of $5,000.00 from John B. Coleman * * *." The defendant contends that the demurrer to this count should have been sustained because it did not allege in sufficient detail the circumstances of the crime charged.

An information or indictment must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense. State v. Buttner, 180 Neb. 529, 143 N. W. 2d 907. But it is generally sufficient to allege the crime

in the language of the statute. Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868. It is not necessary to state the detailed particulars of the crime in the meticulous manner prescribed by the common law. Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111.

An indictment or information alone need not be full protection against double jeopardy because a defendant may allege and prove facts outside the record in support of a plea of former adjudication. Cowan v. State, *supra*. The remedy of a bill of particulars is available to assist a defendant in preparing his defense and to protect him against a second prosecution for the same offense. Myers v. United States, 15 F. 2d 977.

In this case Count III of the indictment was in the language of the statute and identified the person solicited, proposed, or agreed with. The particular transaction was alleged in greater detail in the first two counts; and although these counts were dismissed, they did serve some purpose in advising the defendant as to the nature of the charge against him. See Bartley v. State, 53 Neb. 310, 73 N. W. 744. There was no defect or imperfection in Count III of the indictment which prejudiced the substantial rights of the defendant upon the merits. § 29-1501, R. R. S. 1943. The demurrer was properly overruled as to Count III.

Upon the motion of the State, the indictment against the defendant was consolidated for trial with indictments against Ronald J. Abboud and Stephen T. Novak. The defendant's later motion for a separate trial was overruled. The defendant contends Article I, section 6, of the Constitution of Nebraska, which provides that the "right of trial by jury shall remain inviolate" guarantees the right to a separate trial. The defendant's theory is that the 1957 amendment to section 29-2002, R. R. S. 1943, was ineffective because of this constitutional provision.

The constitutional provision was intended to preserve the right of trial by jury as it existed at common law

and under the statutes in force when the Constitution was adopted. State v. Hauser, 137 Neb. 138, 288 N. W. 518; Bell v. State, 104 Neb. 203, 176 N. W. 544. The former right to separate trials of defendants who were jointly indicted was statutory in origin. See G. S., § 465, p. 825. The right was not of common-law origin and was not guaranteed by the Constitution.

The right to a separate trial now depends upon a showing that prejudice will result from a joint trial. State v. Brown, 174 Neb. 387, 118 N. W. 2d 328; State v. Hall, 176 Neb. 295, 125 N. W. 2d 918. The defendant argues that he was prejudiced in this case because he was prevented from using the testimony of his codefendants. The defendant relies upon United States v. Echeles, 352 F. 2d 892, in support of this contention. In the Echeles case a codefendant had made prior statements to the effect that the defendant was blameless, and it was held that this circumstance required that a separate trial be granted. The record in this case does not show that the defendant would have been able to benefit from any testimony of his codefendants if his motion for a separate trial had been granted. The record does not show an abuse of discretion in refusing to grant the defendant's motion for a separate trial.

The principal witness for the State was John B. Coleman who wanted the property rezoned so that he could construct an apartment development on the site. Coleman testified at length concerning conversations with the defendant and other members of the conspiracy. Much of the evidence against the defendant Adams consisted of statements made to Coleman by other members of the conspiracy out of the presence of the defendant. The defendant contends that this evidence should not have been admitted because there was no independent evidence of the conspiracy.

Where there is proof of a conspiracy, the acts and declarations of a conspirator in furtherance of the conspiracy are the acts and declarations of all and may be

admitted in evidence against the other conspirators. Lamb v. State, 69 Neb. 212, 95 N. W. 1050. The fact of the conspiracy may be proved by circumstantial evidence and the order of proof is a matter within the discretion of the trial court. O'Brien v. State, 69 Neb. 691, 96 N. W. 649.

The record shows that the rezoning was approved by the city council on September 15, 1964. Coleman testified that the defendant and Ronald J. Abboud came to Coleman's hotel room that evening and that Abboud handed a piece of paper to the defendant which the jury could find was a check in the amount of $5,000 from Abboud to the defendant. The following day Coleman gave Abboud a check for $5,000 to reimburse him for the payment to the defendant.

Coleman further testified that the defendant returned to Coleman's hotel room on September 22, 1964, and complained that the $5,000 check from Abboud had been returned unpaid. This conversation took place in the presence of John W. Castle, a lawyer from Chicago, Illinois, employed by Coleman.

Castle identified exhibit 8 as being a photostatic copy of the check which Adams showed to Coleman and Castle at that time. The check was in the amount of $5,000, dated September 16, 1964, drawn on the account of Abboud Investment Company, Inc., and payable to Ernest A. Adams Real Estate Trust Acct. The check had been returned unpaid for the reason that it was drawn on uncollected funds. It was apparent from the conversation that the check from Abboud to Adams represented the payment that had been made by Coleman to Abboud for the benefit of Adams, but that Abboud had given Adams a bad check. Adams was complaining to Coleman about the Abboud check because it represented the payment from Coleman to Adams made through Abboud.

The evidence was sufficient for the jury to find that a conspiracy existed and that the defendant was a mem-

ber of it. The statements made by the other members of the conspiracy out of the presence of the defendant were admissible against him.

The evidence in this case, although largely circumstantial, was sufficient to permit the jury to find the defendant guilty. The jury was not required to accept the defendant's explanation concerning the $5,000 check he received from Abboud. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428.

During his testimony, Coleman was permitted to refer to a memorandum, exhibit 11, which had been prepared from notes made by the witness and one of his attorneys. The defendant contends that this was improper because the memorandum had been prepared in part from notes made by the attorney, and the testimony did not show when the notes were made.

Coleman testified at length in regard to transactions and conversations with a large number of persons which occurred over a period of about 6 months. He testified that the memorandum had been made under his supervision, that it was based on notes that he had made at the time the incident had occurred, and that after referring to the notes he had a present recollection of the events as they occurred. He referred to the memorandum for the purpose of refreshing his recollection as to dates and similar details.

The testimony of Coleman was based upon his independent recollection of the events referred to. Such a witness may use original memoranda or a copy prepared by himself or another to refresh his recollection. See, Anderson v. State, 150 Neb. 116, 33 N. W. 2d 362; Erdman v. State, 90 Neb. 642, 134 N. W. 258, Ann. Cas. 1913B 577; 58 Am. Jur., Witnesses, § 584, p. 326; 98 C. J. S., Witnesses, § 358, p. 83. The use of the memorandum in this case was proper.

On recross-examination Coleman was asked if the

defendant had ever told him that Abboud, Novak, Buttner, or anyone else was his agent. The witness had started to answer the question when he was interrupted and asked to answer it yes or no. When this request was refused, the defendant moved for a mistrial which was overruled.

The manner in which a witness may be examined is within the sound discretion of the court. Jordan v. State, 101 Neb. 430, 163 N. W. 801. The ruling of the trial court in this case was not an abuse of discretion. See 98 C. J. S., Witnesses, § 352, p. 73.

Both Adams and Novak testified at the trial, but Abboud did not testify. By instruction No. 35, the trial court advised the jury that it could not draw any inference from the fact that Abboud had not testified. Similar instructions have been approved where the jury was advised that nothing may be taken against a defendant who has not testified. Murray v. State, 119 Neb. 16, 226 N. W. 793; Lamb v. State, 69 Neb. 212, 95 N. W. 1050.

The words "neglect or refusal to testify," to which the defendant objects, appear in section 29-2011, R. R. S. 1943, which was incorporated verbatim in the instruction. The instruction did not imply that Abboud had a duty to testify, and the instruction could not have prejudiced the defendant in any way. The assignment of error is without merit.

In his motion for new trial the defendant alleged misconduct on the part of a juror for failing to disclose on voir dire examination that she had signed a petition to recall mayor Dworak. The voir dire examination of the jurors is not a part of the bill of exceptions and it is not clear as to how the inquiry was made concerning this circumstance. Apparently, the prospective jurors were asked generally, as a group, if they had been involved in any political campaign for the recall of any officers.

At the hearing on the motion for new trial, the juror testified that no names were mentioned in the question asked on voir dire, that she probably would have for-

gotten about signing the petition at that time, that she did not form any opinion about the guilt or innocence of the defendant, that she was not acquainted with any of the councilmen, and that the recall was directed only against the mayor.

A motion for new trial for alleged misconduct of a juror is addressed to the sound discretion of the trial court. Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689. As a general rule a verdict will not be set aside for reasons that would be sufficient to disqualify a juror on a challenge for cause, which existed before the juror was sworn but which was unknown to the accused until after the verdict, unless it appears from the whole case that the substantial rights of the accused were materially affected by the fact that the juror served in the case.

The record in this case does not show an abuse of discretion in the ruling on the motion for new trial.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD J. ABBOUD, APPELLANT.

147 N. W. 2d 152

Filed December 16, 1966. No. 36308.

1. **Grand Juries.** Where a sufficient number of qualified jurors cannot be obtained from the first panel drawn from a grand jury list, as provided in sections 25-1629 and 25-1633, R. R. S. 1943, successive lists and panels shall be drawn until a sufficient number of qualified jurors has been obtained.
2. ———. The only objection to the grand jury which can be made to the indictment by a plea in abatement is to show that the jurors lacked the positive qualifications demanded by law.
3. **Grand Juries: Witnesses.** An indictment is valid where the person indicted was called as a witness before the grand jury if the witness claimed and was granted his privilege against self-incrimination.
4. **Grand Juries.** The trial court may in its discretion require that

an oath of secrecy be administered to the witnesses before a grand jury.

5. **Evidence.** Where one party to a conversation testifies as to the conversation, a recording of the conversation made with the consent of the witness may be admitted into evidence.
6. **Criminal Law.** A defendant is not entitled to additional peremptory challenges because the indictment charges separate offenses in separate counts.
7. **Trial.** Instructions to the jury should be considered and construed as a whole.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Marks, Clare, Hopkins & Rauth, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ., and MANASIL and HASTINGS, District Judges.

BOSLAUGH, J.

The defendant, Ronald J. Abboud, was convicted on three counts of aiding and abetting Ernest A. Adams and Stephen T. Novak in soliciting, proposing, or agreeing to receive bribes in violation of section 28-708, R. R. S. 1943. His motion for new trial was overruled and he has appealed.

The case arose out of an application to rezone a tract of land at Eighty-first Street and Farnam Drive in Omaha, Nebraska. Adams and Novak were members of the city council who voted for the rezoning. The State's theory of the case was that the defendant, in conspiracy with others, aided and abetted Adams and Novak in soliciting, proposing, and agreeing to receive bribes for favorable votes on the rezoning application.

The defendant was charged by indictment. Upon the motion of the State, the indictment against the defendant was consolidated for trial with indictments against Adams and Novak. Although each defendant

has appealed separately, a number of the assignments of error are common to all three appeals.

We have this day affirmed the conviction of Adams. See State v. Adams, *ante* p. 75, 147 N. W 2d 144. This opinion will be limited to a discussion of the assignments of error which are not disposed of by the opinion in State v. Adams, *supra.*

The procedure for the selection of a grand jury in this state is prescribed by statute. The jury commissioner is directed to select at random the names of 80 persons from the jury list. § 25-1629, R. R. S. 1943. Forty names are then drawn from a box or wheel containing the 80 names. From this list of 40 names the jury commissioner, the presiding judge, and one other person designated by the presiding judge select 16 persons as grand jurors and 3 persons as alternates. § 25-1633, R. R. S. 1943.

The grand jury in this case was not selected from the first 80 names selected at random by the jury commissioner. The trial court found that an insufficient number of qualified jurors was contained on the first list and directed that a second, and later a third, list be drawn. The defendant contends that this was illegal and that the proceedings of the grand jury were void.

The defendant argues that the jury must be selected from the first 80 names because there is no specific provision authorizing a second panel if the first proves to be insufficient. We think that the more reasonable interpretation of the statute is that which was adopted by the district court. Where the first panel proves to be insufficient, the proper procedure is to select additional panels until a sufficient number of qualified jurors has been obtained.

The defendant further complains that an unlawful voir dire examination of prospective jurors was conducted and jurors were improperly disqualified or excused. The statute authorizes the jury selection board to mail an examination form or questionnaire to pros-

pective jurors and to examine them under oath as to their qualifications. §§ 25-1633.02 and 25-1633.03, R. R. S. 1943. The statute further permits the district court, in its sound discretion, to excuse for cause any grand juror who has been summoned. § 25-1601, R. R. S. 1943.

In Krause v. State, 88 Neb. 473, 129 N. W. 1020, Ann. Cas. 1912B 736, this court held that a substantial compliance with the statute in the selection of a grand jury was sufficient, and that the only objection which could be taken by plea in abatement would be to show the jurors lacked positive qualifications demanded by law. This court further stated: "The legislature having provided the grounds upon which and the procedure by which an indictment may be attacked, none others should be recognized." The assignment of error is without merit.

The defendant further complains that the indictment is invalid because he was summoned to appear as a witness before the grand jury. In O'Bryan v. State, 111 Neb. 733, 197 N. W. 609, the defendant was subpoenaed as a witness and testified before the grand jury. This court held that the failure to claim the constitutional right against self-incrimination waived the privilege.

In this case in ruling upon the motion to quash, the trial court noted that the defendant had been cautioned as to his privilege against self-incrimination, had claimed the privilege, and the privilege was sustained by the trial court. The assignment of error is without merit.

The defendant further complains that the oath administered to the witnesses before the grand jury required them to keep their testimony secret. The statute, section 29-1410, R. R. S. 1943, does not prescribe the form of the oath other than that the witness shall testify truly of such matters and things as may be lawfully inquired of before the jury. An oath of secrecy is required in some jurisdictions and is in keeping with the secrecy which is traditional in grand jury proceedings. See, 24 Am. Jur., Grand Jury, § 47, 1966 Cum. Supp., p. 153;

4 Wharton's Criminal Law and Procedure, § 1719, p. 487. The oath administered in this case was not improper.

The indictment against the defendant originally contained seven counts. A demurrer was sustained as to the first four counts. The defendant contends that the demurrer should have been sustained as to the last three counts because the defendant cannot be convicted of aiding and abetting unless the act of the principal is a crime.

The principal referred to in each of the last three counts was a member of the city council, a "public officer," and the crime charged was soliciting, proposing, and agreeing to receive a bribe. The act of the principal alleged in each count was a crime under section 28-708, R. R. S. 1943, and was sufficient to support a charge of aiding and abetting.

The principal witness for the State was John B. Coleman who wanted the property rezoned so that he could construct an apartment development on the site. Coleman testified at length concerning conversations with the defendant and other members of the conspiracy. A number of these conversations which took place in Coleman's hotel room were recorded upon a tape recorder.

The defendant moved to suppress the recordings and later objected to their admission in evidence. The motion to suppress was overruled and the recordings were received in evidence over objection and heard by the jury. The defendant contends that the tape recordings were obtained by "electronic eavesdropping" and were an invasion of the defendant's right of privacy. The contention is without merit.

The conversations which were recorded took place in a hotel room rented by Coleman. The conversations were between Coleman and the defendant and other members of the conspiracy. Coleman testified at length concerning these conversations, and the recordings merely corroborated his testimony as any other witness pres-

ent might have done. The motion to suppress and the objections to the recordings were properly overruled. See, Lopez v. United States, 373 U. S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462; On Lee v. United States, 343 U. S. 747, 72 S. Ct. 967, 96 L. Ed. 1270.

The defendant claimed the right to peremptorily challenge six jurors but the trial court allowed him only three peremptory challenges. Section 29-2005, R. R. S. 1943, provides for three peremptory challenges where the offense is punishable by imprisonment for 18 months or less and for six peremptory challenges where the punishment may exceed 18 months imprisonment but is less than life. The defendant was charged in three counts with violating section 28-708, R. R. S. 1943, which is punishable by imprisonment for 1 year.

A defendant is not entitled to additional peremptory challenges because the indictment charges separate offenses in separate counts. See 50 C. J. S., Juries, § 281, p. 1077. The maximum punishment under any one count was imprisonment for 1 year. The ruling of the trial court was correct.

Instruction No. 4, relating to aiders and abettors, contained this sentence: "In this connection you are instructed that the State has offered evidence tending to establish the guilt of the defendant Ronald J. Abboud by reason of his being an abettor or accomplice." The defendant complains that the instruction constituted a comment on the evidence and invaded the province of the jury.

The counts of the indictment which were submitted to the jury all charged the defendant as an aider and abettor. The other instructions advised the jury that it might find the defendant guilty on all three counts. The effect of all of the instructions was to tell the jury that there was evidence tending to establish the defendant's guilt, but that it was for the jury to decide whether it established his guilt. Under the circumstances of this case, the particular instruction given was not preju-

dicial to the defendant when considered together with the other instructions.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN T. NOVAK, APPELLANT.

147 N. W. 2d 156

Filed December 16, 1966. No. 36309.

1. **Indictments and Informations.** Where a statutory crime may be committed by any of several methods, an indictment may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other.
2. **Grand Juries.** There was no prejudice to a substantial right of a defendant charged by indictment who was called as a witness before the grand jury and denied the right to have his counsel present in the grand jury room, where the defendant claimed his privilege against self-incrimination and the privilege was sustained by the trial court.
3. **Criminal Law.** The trial court is invested with a broad discretion in ruling upon a discovery motion in a criminal case.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

James F. Green, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ., and MANASIL and HASTINGS, District Judges.

BOSLAUGH, J.

The defendant, Stephen T. Novak, was convicted of soliciting, proposing, or agreeing to receive a bribe in violation of section 28-708, R. R. S. 1943. His motion for new trial was overruled and he has appealed.

The case arose out of an application to rezone a tract of land at Eighty-first Street and Farnam Drive in Omaha, Nebraska. The defendant was a member of the city council and voted for the rezoning. The State's theory of the case is that the defendant, in conspiracy with others, solicited, proposed, and agreed to receive a bribe in the amount of $10,000 for a favorable vote on the rezoning application.

The defendant was charged by indictment. Upon the motion of the State, the indictment against the defendant was consolidated for trial with indictments against Ernest A. Adams and Ronald J. Abboud. Although each defendant has appealed separately, a number of the assignments of error are common to all three appeals.

We have this day affirmed the convictions of Adams and Abboud. See State v. Adams, *ante* p. 75, 147 N. W. 2d 144; State v. Abboud, *ante* p. 84, 147 N. W. 2d 152. This opinion will be limited to a discussion of the assignments of error which are not disposed of by the opinions in State v. Adams, *supra,* and State v. Abboud, *supra.*

The defendant's motion to quash the indictment was overruled and that ruling is assigned as error. The defendant complains that the indictment stated three charges in the alternative in a single count.

The defendant was charged in the language of the statute with soliciting, proposing, or agreeing to receive a bribe. Where a statutory crime may be committed by any of several methods, an indictment may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other. Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357; Winkelmann v. State, 114 Neb. 1, 205 N. W. 565. There was no prejudice to the substantial rights of the defendant upon the merits. § 29-1501, R. R. S. 1943; Brown v. State, 107 Neb. 120, 185 N. W. 344; Smith v. State, 109 Neb. 579, 191 N. W. 687.

The defendant, over objection, was required to appear

before the grand jury as a witness and was denied the right to have his counsel present in the grand jury room. The defendant contends that the denial of his request for the presence of his counsel in the grand jury room invalidates the indictment.

As we understand the record, there is no contention that the defendant was compelled to answer any questions other than as to his name and address; that he was advised as to his right to counsel, his privilege against self-incrimination, and that he would be permitted to leave the grand jury room to consult with counsel; and that defendant claimed his privilege against self-incrimination, was permitted to leave the jury room, and that his privilege was sustained by the trial court. Under the circumstances of this case the denial of the right to have his counsel present in the grand jury room did not result in any prejudice to a substantial right of the defendant. The assignment of error is without merit.

The defendant filed a discovery motion which requested permission to inspect and copy transcripts of recordings of the conversations between John B. Coleman, a witness for the State, and the defendant and others, and "all other evidence in the possession of the prosecution relevant to exonerate the defendant or to establish any defense available to the defendant." This motion was overruled, but the trial court later ordered that the defendant be furnished with a transcript of the tape recordings. The record further indicates that the defendant's counsel was afforded an opportunity to hear the recordings in their entirety before they were received in evidence.

The trial court is invested with a broad discretion in ruling upon a discovery motion in a criminal case. Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323. The record does not show an abuse of that discretion by the trial court in this case.

Recordings of conversations between Coleman and the defendant, and others, were received in evidence over

the objections of the defendant. The defendant complains that the recordings should not have been received because there was no sufficient identification of the voices which had been recorded and were heard by the jury.

Coleman, who was the principal witness for the State, testified at length concerning the conversations which had been recorded. There were other witnesses who testified as to who was present at the time the conversations took place. There was sufficient identification of the voices to permit the recordings to be received in evidence and be heard by the jury.

The rezoning application involved in this case did not receive a favorable vote upon its first consideration by the planning board of the city of Omaha. At the suggestion of Carville R. Buttner, a member of the planning board, the defendant and Buttner made a trip to Houston, Texas, at Coleman's expense to inspect similar developments there.

The rezoning application was approved by the planning board on August 3, 1964. Coleman testified that on that evening he talked with Buttner and was told that he would have to pay $2,000 to the defendant, several hundred dollars to Adams, and give the construction contract to Abboud to get the rezoning approved by the city council.

On the following morning, Coleman had a conversation with Buttner, Abboud, and the defendant. This conversation was similar to that which had occurred on the preceding evening in which Coleman had been advised that he would have to pay Novak and Adams and give the construction contract to Abboud to obtain council approval of the rezoning.

A third, similar conversation took place with Buttner on August 13, 1964. A fourth, similar conversation took place with Abboud the following morning. According to Abboud, Coleman would have to pay $2,000 to Novak and $5,000 to Adams.

Coleman testified that he delivered a check, identified as exhibit 3, for $2,000 to the defendant on August 27, 1964. This check was later returned to Coleman by Abboud uncashed. On September 7, 1964, Coleman had a conversation with the defendant in which the defendant said that he had given the check to Abboud because the defendant felt that it was too dangerous to have a check made out to him directly.

On September 8, 1964, Coleman had a conversation with the defendant in which the defendant stated that Adams would want his payment the night after the rezoning was approved. The city council held a public hearing on the rezoning application that evening. Late in the evening Coleman had a conversation with Abboud in which Abboud said that the payment to the defendant would be $10,000.

On September 10, 1964, Coleman had a conversation with Abboud and the defendant in which Coleman was directed to issue a check for $2,000 to Abboud for the defendant. Coleman then delivered a check, identified as exhibit 1, in the amount of $2,000 to Abboud. Exhibit 43 is a photocopy of a check in the amount of $2,000 payable to the defendant and signed by Abboud which was dated and cashed on September 11, 1964.

On September 23, 1964, Coleman had a conversation with Abboud regarding the $8,000 balance to be paid Novak. Coleman at that time delivered a check in the amount of $8,000 to Abboud.

The evidence, although in part circumstantial, was sufficient for the jury to find that a conspiracy existed; that the defendant was a member of the conspiracy; and that he was guilty of soliciting, proposing, and agreeing to receive a bribe in the amount of $10,000 from Coleman.

The defendant contends that the trial court erred in admitting in evidence exhibits 1, 2, 3, 4, 43, and 44. Exhibits 1, 3, and 43 relate to the defendant in this case. Exhibits 2, 4, and 44 relate to Adams.

Exhibit 44 is a photocopy of the check for $5,000 from Abboud to Adams which was later returned unpaid as drawn on uncollected funds. Exhibit 8, referred to in State v. Adams, *ante* p. 75, 147 N. W. 2d 144, is a photocopy of the same check after it had been returned to Adams with an advise of charge slip attached to it. Exhibit 2 is the check for $5,000 which Coleman gave to Abboud on September 16, 1964, to reimburse Abboud for the payment Abboud had made to Adams. Exhibit 4 is a photocopy of exhibit 2 which was made before Coleman delivered exhibit 2 to Abboud. A notation, "Earnest Deposit on 72 Maple," which appears on exhibit 2, was placed on the exhibit after it had been delivered to Abboud by Coleman and does not appear on exhibit 4.

Exhibit 3 is the check for $2,000 from Coleman to "Steve Novak Realty Company" which was delivered to the defendant by Coleman on August 27, 1964, and later returned uncashed by Abboud. Exhibit 1 is the check for $2,000 from Coleman to "Abboud Investment Co." handed to Abboud by Coleman on September 10, 1964. Exhibit 43 is a photocopy of the check for $2,000 from "Abboud Investment Company, Inc." to the defendant which was dated and cashed September 11, 1964.

The defendant argues that the checks were not admissible because they were evidence of lawful acts. The evidence of the State, which the jury believed, established that the acts evidenced by the checks were unlawful acts.

The defendant further argues that there was no proof that the banks or the accounts on which the checks were drawn existed, and that some of the payees and drawers were not identified. The defendant was charged with soliciting, proposing, or agreeing to receive a bribe. The exhibits were clearly admissible as evidence of the defendant's efforts to obtain a bribe even though they also tended to prove that the bribe was actually received.

So far as the best evidence rule is concerned, the orig-

inal check, of which exhibits 8 and 44 are photocopies, was produced by Adams and appears as exhibit 54. As to exhibit 43, the testimony shows that the photocopy was made after the checks had been presented and paid by the Omaha National Bank, and that in the normal course of business the original would be returned to the maker Abboud. The objections to the exhibits were properly overruled.

The defendant complains that the trial court failed to instruct the jury concerning the crime with which the defendant was charged, and that instruction No. 13 was erroneous.

Instruction No. 2 advised the jury concerning section 28-708, R. R. S. 1943, as applicable in this case. Instruction No. 3 advised the jury that a city councilman is a public officer. Instruction No. 6 summarized the charge against the defendant. Instruction No. 15 advised the jury as to the material elements of the charge against the defendant. We think the instructions given concerning the crime charged were adequate.

Instruction No. 13 advised the jury that it must consider the guilt of each defendant separately and that it must acquit Abboud if verdicts of not guilty were returned as to Adams and Novak. We find no error in the instruction.

The judgment of the district court is affirmed.

AFFIRMED.

IN THE INTEREST OF RONDA OTTO ET AL.
DUANE L. HUBBARD, APPELLEE, V. RUBY OTTO LOEWENSTEIN, APPELLANT.

147 N. W. 2d 164

Filed December 16, 1966. No. 36311.

1. **Parent and Child: Infants. Jurisdiction in proceedings to declare children neglected or dependent under section 43-201, R. S. Supp., 1965, does not depend upon the domicile of the parents.**

2. **Infants: Courts.** Where cases are interwoven and interdependent and involve the custody of the same children and the fitness of one of the parties then before the court to have their custody, and the controversy involved has already been considered and determined by the court in former proceedings, the court may examine its own records and take judicial notice of its own proceedings and judgment in the former action.
3. **Trial: Evidence.** Where the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Mingus & Mingus, for appellant.

J. Karr Taylor, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

MCCOWN, J.

This is an appeal by Ruby Otto Loewenstein, the mother of two children, aged 8 and 3 years, from a judgment of the district court for Buffalo County declaring the children dependent and neglected children, and placing them in the custody of the State of Nebraska, Department of Public Welfare, with full power to place the children out for adoption.

The first assignment of error challenges the jurisdiction of the court on the ground that the petition was not properly verified by affidavit; that the mother was a resident of Dawson County; that the residence of the children followed that of the mother; and that Buffalo County was not the proper county for jurisdiction. The petition specifically alleges that the minor children, as of the date of filing on January 22, 1966, were in the custody of Fern Anderson, Kearney, where they were placed by the sheriff November 13, 1965. These facts

meet the requirements of the statutes and are not denied either in the pleadings or the evidence. The petition is verified on oath by the deputy county attorney, and such verification is clearly sufficient as an affidavit. The record also shows that the divorce action in which custody had originally been granted to Ruby Otto was in Buffalo County. Jurisdiction in proceedings to declare children neglected or dependent under section 43-201, R. S. Supp., 1965, does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. See Jones v. State, 175 Neb. 711, 123 N. W. 2d 633.

It is also assigned as error that the mother and natural guardian was not given proper notice in the premises. The record discloses that in accordance with section 43-206, R. S. Supp., 1965, Fern Anderson, the person having custody of the children was served with summons as required. Notice of the filing of this petition and of the time and place of hearing were received by the mother on January 25, 1966. Both the mother and the father were present at the hearing on February 1, 1966, and the mother was also represented by counsel. Constitutional and statutory requirements of notice and due process were complied with, and this assignment of error cannot be sustained.

The remaining assignments of error basically have to do with the sufficiency of the evidence in the record to support the judgment and to questions involving evidence which could properly be considered by the court. It is quite obvious that all parties concerned proceeded with a knowledge of certain facts which are not in this record, together with other facts which are only partially reflected in the record. One of these was an order of the district court for Buffalo County taking the custody of these children away from their mother in November 1965 "in the divorce case." No copy of the order or record of the hearing in November 1965 is in evidence here. The court, however, stated in the record that such

an order and findings supporting it had been entered, and extensively questioned the mother as to why she did not appear at the November hearing although she had had notice of it. While a court will not ordinarily in one case take judicial notice of the record in another case, an exception rather than the rule applies here. Where cases are interwoven and interdependent and involve the custody of the same children and the fitness of one of the parties then before the court to have their custody, and the controversy involved has already been considered and determined by the court in former proceedings, the court may examine its own records and take judicial notice of its own proceedings and judgment in the former action. See Weiner v. Morgan, 175 Neb. 656, 122 N. W. 2d 871.

The appellant here obviously desires to have the word "neglected" interpreted as applying solely to physical neglect and having no relationship to the morals or well-being of the children. The specific language of section 43-201, R. S. Supp., 1965, refers to the health, morals, or well-being of the child, and specifically refers also to lack of proper parental care by reason of the fault or habits of his parent, guardian, or custodian. Without going into the rather sordid evidence in this record, it amply supports the finding of the court that the appellant was unfit to have the custody of these children. There was also some testimony of physical neglect which was denied by the mother. Where the evidence on material questions of fact in a case such as the instant case is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other. See Lakey v. Gudgel, 158 Neb. 116, 62 N. W. 2d 525.

The father of the children also appeared as a witness here and conceded that he would not be a proper person to look after these children. Where both parents

are affirmatively found to be unfit, the custody of the child will be determined solely by the welfare and best interests of the child. See Lakey v. Gudgel, *supra*.

Under the circumstances here, even in the limited connotation of the evidence produced in the record, these children were neglected and dependent children within the meaning of the statute.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

SMITH, J., concurring in result.

The district court noticed its custodial order made in the divorce suit, although the order had not been reviewed on appeal. To sanction the practice the majority opinion modifies a rule. In the past a district court ordinarily declined to notice its record of a case not then before it. An exception for final orders on appeal is similar to the modification announced today. See, Weiner v. Morgan, 175 Neb. 656, 122 N. W. 2d 871; Schroeder v. Homestead Corp., 163 Neb. 43, 77 N. W. 2d 678; State ex rel. Weasmer v. Manpower of Omaha, Inc., 163 Neb. 529, 80 N. W. 2d 580; Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874; Johnson v. Marsh, 146 Neb. 257, 19 N. W. 2d 366.

The judicial notice under consideration is simply a substitute for formal proof, and its efficient test is facility of verification. See McCormick on Evidence, § 323, p. 687, and § 327, p. 701. No longer should we demarcate a record of a case before a court from records of other cases in the same court, for one may be verified as easily as another. Interdependency has its place but not in the area of judicial notice. I hope that the new rule, which is adequate for affirmance today, does not circumscribe permissive notice for the future.

W. L. JACOBS, FOR HIMSELF AND ALL PERSONS SIMILARLY SITUATED, APPELLEE, V. CITY OF OMAHA, APPELLANT.

147 N. W. 2d 160

Filed December 16, 1966. No. 36329.

1. **Municipal Corporations.** A municipal corporation possesses, and can exercise, the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.
2. ———. Statutes granting powers to municipalities are to be strictly construed, and where doubt exists such doubt must be resolved against the grant.
3. **Municipal Corporations: Zoning.** The application of the provisions of section 28.12.020 of the Omaha municipal code to the 3-mile zone area can be fairly implied from the power granted to the city of Omaha by section 14-419, R. R. S. 1943.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and dismissed.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, Walter J. Matejka, James E. Fellows, Allen L. Morrow, and P. D. Spenceri, for appellant.

John W. Delehant, Jr., for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

SPENCER, J.

This action, filed July 20, 1962, challenges the validity of an ordinance requiring a permit and the payment of fees for curb cuts and driveway approaches in the area within 3 miles from the corporate limits of the city of Omaha.

Section 14-419, R. R. S. 1943, as of July 20, 1962, provided: "The city council, in cities of the metropolitan class, shall have the power by ordinance to regulate, in areas within three miles of the corporate limits, except

as to construction on farms for farm purposes, (1) the minimum standards of construction of buildings, dwellings, and other structures, in order to provide safe and sound condition thereof for the preservation of health, safety, security, and general welfare, and as to electric wiring, heating, plumbing, pipe fitting, sewer connections, ventilation, size of habitable rooms, and the method of constructing buildings, and to provide for inspection thereof and building permits, (2) the removal and tearing down of buildings, dwellings, and other structures in such areas which constitute nuisances because of the dilapidated, unsafe, or rundown condition or conditions, and (3) except as to the United States of America, the State of Nebraska, any county of the state, or any city or village in the state, the nature, kind, and manner of constructing streets, alleys, sidewalks, and sewers."

Pursuant thereto, the city of Omaha adopted section 52.04.030 of the Omaha municipal code, which, so far as material herein, provides as follows: "Streets, alleys and sidewalks. (a) In areas outside the city limits and within three miles of the corporate limits of the city of Omaha, the provisions of all ordinances and requirements applicable within the City of Omaha regarding the nature, kind, and manner of constructing streets, alleys, sidewalks, and sewers shall apply and control, * * *."

On November 1, 1960, the city adopted chapter 28.12 of the Omaha municipal code. Section 28.12.020 provides as follows: "Permit, Prerequisite. It shall be unlawful for any person to cut, deface, break out or remove any curbing of any street or to construct any driveway approach without first having obtained the permit provided for in the following Section of this Chapter." The fees in question were collected under the provisions of this ordinance.

Section 28.12.010, so far as material herein, provides: "Definitions. Unless otherwise expressly stated or the context clearly indicates a different intention, the fol-

lowing terms shall, for the purpose of this Chapter have the meanings indicated in this section. * * *

"Driveway Approach. An area, construction or facility between the roadway of a public street and private property intended to provide access for vehicles from the roadway of a public street to private property. For clarification, a driveway approach must provide access to something definite on private property such as a parking area, a driveway or a door at least seven feet wide, intended and used for the entrance of vehicles. * * *

"Street. A public way for the purpose of vehicular and pedestrian travel in the City of Omaha and shall include the entire area within the right-of-way."

The case was submitted on a stipulation of facts. Since November 16, 1960, no building permits have been issued within the 3-mile zone unless the curb cut and driveway approach fee was paid. None of the streets within the 3-mile zone were dedicated to the City of Omaha, but rather all were dedicated to the public for public use. Many of the streets were actually constructed by improvement districts organized under sections 31-727 to 31-766, R. R. S. 1943, and said improvement districts included curb cuts which were poured at the time of the paving so that no curb cut was made at the time of the driveway construction. There are so many persons involved whose rights are similar to those of the plaintiff that it was impractical to join them all as parties plaintiff. This action is properly brought as a class action.

The trial court held that the city had no power to control curb cuts and driveway approaches outside the city, and found the ordinance in question void. The total amount of the fees collected by the city under the ordinance was $79,155, and this amount was ordered paid into court for distribution under further order of the court. The city perfected an appeal to this court.

At the outset, we note that an amendment to section

14-419, R. R. S. 1943, in 1965 eliminated the questions here presented for the future, but for the purpose of this action this statute must be construed as it existed in 1962.

Our law is well settled: "* * * that a municipal corporation 'possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.' " Christensen v. City of Fremont, 45 Neb. 160, 63 N. W. 364.

Essentially, the question presented is whether section 14-419, R. R. S. 1943, is broad enough, within the ambit of this rule, to permit the city to regulate curb cuts or to control construction of driveway approaches after the initial construction of the street. Appellee concedes that the curb is a part of the street, and that section 14-419, R. R. S. 1943, grants the city the power to regulate the initial construction of street curbing. Appellee's position, however, is that the statute does not give regulatory power over streets, but merely gives regulatory power over "the nature, kind, and manner of constructing streets."

Statutes granting powers to municipalities are to be strictly construed, and where doubt exists such doubt must be resolved against the grant. Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558. Is there sufficient doubt in the wording of section 14-419, R. R. S. 1943, to bring it within the operation of this rule? We hold there is not.

The statutory language is: "* * * to regulate * * * the nature, kind, and manner of constructing streets." Appellee adopts the premise that: "It is clear that making curb cuts upon public streets is in the nature of maintenance or repair work," and then argues that "to regulate construction" cannot be interpreted as including the right to regulate repair or maintenance work.

Assuming the correctness of appellee's premise, which

we do not concede as suggested hereafter, the obvious purpose of the statute is to give the city an opportunity to fix and maintain minimum standards in an area which may in the immediate future be a part of the city. Without some restriction, the area developers could saddle the city with inferior streets. If the appellee is correct, the city, for its protection, may control the construction in the first instance, but loses all right to insist on the preservation of the applicable standards as soon as the street is built. This obviously is not the intent of the statute. The statute must be considered as a whole. The broad scope of the first two classifications suggests the grant in question is not so limited as appellee would have us hold.

Construed in context, it is apparent that the power to change the street, which a curb cut would be, or install a driveway approach which involves a curb cut, is not a repair but is in effect a new installation or construction. The statute as we construe it applies not only to the first but to every construction, or, more properly, every reconstruction. While curb cuts and changes in the street are not expressly mentioned, they are certainly incident to the power to "regulate the manner of constructing." We hold, therefore, that the application of the provisions of section 28.12.020 of the Omaha municipal code to the 3-mile zone area can be fairly implied from the power granted to the city of Omaha by section 14-419, R. R. S. 1943.

For the reasons given, the judgment of the trial court should be reversed and the action dismissed.

REVERSED AND DISMISSED.

McCOWN, J., dissenting.

I respectfully dissent, basically upon the ground that curb cuts and driveways primarily involve access to, and, therefore, regulatory power over the use of streets, rather than the "nature, kind, and manner of constructing streets, alleys, sidewalks, and sewers."

Where statutes which admittedly are required to be

strictly construed describe specifically only "streets, alleys, sidewalks, and sewers," it requires straining of construction to include private driveways as though they had been specifically mentioned.

I am therefore of the opinion that the judgment of the trial court was correct and should be affirmed.

HERMAN F. BANKS ET AL., APPELLEES AND CROSS-APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLANTS AND CROSS-APPELLEES.

147 N. W. 2d 132

Filed December 20, 1966. No. 36344.

1. **Constitutional Law: Public Lands.** A tenant on school lands may have a property interest resulting from improvements made prior to September 14, 1953, notwithstanding the unconstitutionality of an appraisal and compensation statute that otherwise would be a source of his interest.
2. **Public Lands: Improvements.** Sections 72-240.06, R. S. Supp., 1965, and 72-240.07, R. R. S. 1943, concerning lease of school lands, mean this: If improvements made by a tenant fall within the enumeration of those to be appraised and outside of the enumeration of those to be approved, they are compensable without administrative approval.
3. ———: ———. Sections 72-257 and 72-258, R. S. Supp., 1965, concerning sale of school lands, mean this: In event of such sale to a third person a tenant has a right to compensation resulting from improvements compensable under the lease statutes.
4. ———: ———. The value of a tenant's property interest resulting from improvements on school land is required to be determined prior to sale of the land.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellants.

Maupin, Dent, Kay & Satterfield, McGinley, Lane,

Mueller & Shanahan, Charles Thone, and Charles Huff, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

SMITH, J.

The Board of Educational Lands and Funds took steps to sell school land occupied by plaintiffs under an expiring lease. This controversy followed in the form of a disputed title to permanent improvements on the land. The district court rendered a responsive declaratory judgment. It quieted the title in plaintiffs to a stock well, other structures, and a growing crop. It quieted also the title in the board to loading chutes, corrals, a board windbreak, and land leveling.

The parties relate their assignments of error on appeal and cross-appeal to these topics: Statutory authority for improvements; necessity for administrative approval of proposed improvements; and existence of requisite approval. We study also the nature of an outgoing-tenant's property interest.

The dispute sprang from a major change in legislative policy. For a long time leases had been common and sales rare. The 1965 Legislature directed the board to sell the school lands at the expiration of current leases. In doing so, it made no reference to improvements or to an outgoing-tenant's interest. §§ 72-257 and 72-258, R. S. Supp., 1965. Legislative policy is interwoven with the evidence, which is undisputed.

The board leased 320 acres in Chase County, Nebraska, to plaintiffs on October 16, 1953, for a 12-year term ending December 31, 1965. In connection with the lease plaintiffs paid the outgoing tenant for a house, barn, granary, and the stock well and tower, all of which had been built in 1943. The lease provided that plaintiffs would commit no waste and that the state would have a lien on all improvements as security for performance.

Plaintiffs themselves made improvements. In the be-

ginning they built fences, a loading chute, and a corral. In 1964 they erected the board windbreak. During 1963-1965 they leveled 150 acres of land for irrigation. Subsequent to August 16, 1965, the date of the passage of the sales law, they planted 25 acres in wheat, which was unmatured at the expiration of the lease.

The factual issue of approval by the board is limited to the land leveling; lack of approval for other improvements in question is admitted. Plaintiffs proposed to drill an irrigation well and to irrigate 100 acres in 1963. The estimate of cost was $3,300 for the well and $35 per acre for land leveling. A soil conservationist recommended the leveling.

The board met March 11, 1963. The agenda contained this description of plaintiffs' proposal: "Lessee requests permission to drill an irrigation well on this lease at an approximate cost of 3300, the plan has been approved by the Soil Conservation Service."

The record does not show any action on the proposal for leveling, but a permissible inference of approval is argued. The secretary of the board discussed the proposal in correspondence prior to the meeting but not afterward. A subsequent notification simply stated that the board had approved the request to drill an irrigation well at an approximate cost of $3,300.

In December 1965, the board published notice of public sale on January 6, 1966. To be sold was the land with "All improvements * * * placed (on it) * * * without the approval of the Board * * *, including * * * house, outbuildings, stock well, fencing, also including all growing crops * * * at the time of sale." Plaintiffs commenced the present action on December 29, 1965. We assume that the board is withholding the land from sale pending final judgment. There is no direct evidence of possession in 1966.

Statutes operating on the date of plaintiffs' lease provided a right and a remedy. If the outgoing lessee and the incoming lessee were unable to agree on the value

of improvements, an appraisal was made. It included all buildings, fencing, wells, windmills, irrigation improvements, dams, drainage ditches, trees, plowing for future crops, and growing crops. The incoming lessee was required to pay the appraised value for the benefit of his predecessor. Laws 1953, c. 255, § 1, p. 862; former § 72-240.06, R. R. S. 1943.

Other statutes provided as follows:

"Before any buildings, wells, irrigation improvements, dams, or drainage ditches are placed upon school lands by a lessee, written approval must be obtained from the Board * * * except necessary improvements for the temporary handling and sheltering of livestock. Any such improvements placed upon school lands after September 14, 1953, where written approval * * *was not obtained * * * shall be considered improvements of the land and the lessee shall not be entitled to reimbursement therefor." § 72-240.07, R. R. S. 1943.

"All improvements put on leased public land shall be assessed to the owner of such improvements as personal property, * * *." Laws 1911, c. 104, § 4, p. 372; former § 77-1209, R. R. S. 1943.

In 1957 the Legislature added: "All authorized improvements * * * shall become the property of new lessees in all instances, and payment shall be made to the old lessees * * *." Laws 1957, c. 303, § 1, p. 1107; § 72-240.06 (1), R. S. Supp., 1965.

The board contends that the 1943 structures were unauthorized. It relies on the unconstitutionality of the appraisal statute that preceded the 1953 act. In Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508, an outgoing tenant was deprived of procedural due process; the statute failed to require notification of hearing before the appraisers. Without much explanation we later decided that an outgoing tenant had an interest in structural improvements, notwithstanding the unconstitutionality of the whole statute. Mara v. Norman, 162 Neb. 845, 77 N. W. 2d 569.

The 1953 act and the amendment determine the legal operation of plaintiffs' lease. The former tenant had a property interest and plaintiffs paid him for it. Despite the obscure rationale Mara v. Norman, *supra,* answers the argument of the board.

In order to decide whether board approval of other structures was necessary, we construe the 1953 act. The parties agree that the loading chute and board windbreak are fencing under the statute. We add the corral. It has more the characteristics of fencing in the statutory frame of reference. " 'A fence is an inclosing structure, * * * intended to prevent intrusion from without or straying from within.' " Shamberg v. City of Lincoln, 174 Neb. 146, 116 N. W. 2d 18. See, also, Webster's Third New International Dictionary (unabr.) "corral," p. 511. Because fencing was specified for appraisal but not for approval, plaintiffs were not required to obtain approval.

If our opinion rested entirely on plaintiffs' interest under the leasing statutes, it would be incomplete. The board expects a new owner, not a new tenant. The immediate question is the meaning of the sales sections, which are conjoined with the leasing sections. The answer lies partially in the course of legislation on the general subject.

Under an 1867 act an occupant had an option between receiving the appraised value of his improvements from the purchaser of the school land or removing the improvements within 6 months after sale. G. S., c. 70, § 14, p. 994, § 19, p. 995. The 1897 Legislature made substantial changes. It generally prohibited sales, and it restricted the option between compensation or removal under the leasing policy to moveable improvements. Laws 1897, c. 71, § 1, p. 318, § 5, p. 319. A 1919 statute provided in part: "If the highest bid * * * shall be made by a person other than the lessee the value of all the improvements on the land shall be appraised * * *. The successful bidder * * * shall * * * pay to the county

treasurer, for the use of the former lessee, the amount of the appraisement." Laws 1919, c. 149, § 1, p. 333.

Statutes of 1919 and subsequent years have not restricted compensation to moveable improvements. Moreover, the Legislature has not permitted a tenant to opt for removal. The statutes on their face declare a compensation policy that has been uninterrupted for almost 50 years. It is too late now for us to say that an outgoing tenant necessarily has no interest whatever.

The property interest resulting from structural improvements comprises either a common law privilege of removal or a right to compensation. Such a privilege ought to fit apparent policy; yet the remedy of compensation in the leasing system is exclusive. Kidder v. Wright, 177 Neb. 222, 128 N. W. 2d 683; O'Neil v. Haarberg, 179 Neb. 531, 139 N. W. 2d 217. The privilege would be an inadequate substitute for compensation. In association with irremoveable improvements such as land leveling and well holes, it would be no substitute at all. Tenants would depart empty-handed because of the difference between lease and sale. We conclude that the privilege is not adaptable.

The common law is also hostile to an interest of a former tenant in unmatured crops. Plaintiffs planted wheat during a tenancy for a definite term and after the date of the passage of the sales law. The crop was growing at the expiration of the lease. In such circumstances at common law a tenant is not entitled to crops. See, Peterson v. Vak, 160 Neb. 450, 70 N. W. 2d 436, 51 A. L. R. 2d 1221; Vance v. Henderson, 141 Neb. 766, 4 N. W. 2d 833; Peterson v. Vak, 169 Neb. 441, 100 N. W. 2d 44.

The Legislature has encouraged good husbandry and continuity in farming operations. O'Neil v. Haarberg, *supra;* State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520; State v. Platte Valley P. P. & I. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196. The practice in the western part of

Nebraska is to seed a grain crop in the fall and to harvest it in the summer. A calendar year unit serves no functional purpose in a lease, unless a former tenant retains an interest in the growing crop. If we upheld the board, utilization of crop land during the final year of the lease would be adversely affected. "If such land should not be sold * * *, then it shall be offered for lease as the Board * * * shall provide for a period of six years." § 72-258.01, R. S. Supp., 1965. Few tenants would take that chance.

In our opinion improvements compensable under the leasing statutes are also compensable under the sales statutes. The value of a tenant's property interest is required to be determined prior to sale of the land. Beneficial interests in the educational trust must of course be protected fully. We reiterate:

"The public school lands of the state are trust property and the state is required to administer them as such for the benefit of the common schools * * *.

"* * * These lands * * * are subject to the rules of law applicable to the handling of trust estates because of the status assigned to them by the Constitution." State ex rel. Ebke v. Board of Educational Lands & Funds, *supra.*

Plaintiffs had a property interest resulting from all improvements in question, except the development by land leveling. The judgment is reversed and the cause remanded with directions to render judgment declaring that plaintiffs have a compensable interest resulting from the improvements, except the land leveling, and that the value of their interest is required to be determined prior to the sale. Costs on appeal are taxed to the board.

REVERSED AND REMANDED WITH DIRECTIONS.

BROWER, J., dissenting.

I respectfully dissent from the decision of the court in this case. The result of that decision is that under section 72-240.07, R. R. S. 1943, all enumerated improvements placed upon the school lands by a lessee prior to

September 14, 1953, were the property of the lessee and such improvements placed thereon thereafter were his property also if he had secured written consent of the Board of Educational Lands and Funds. It then gave the lessees everything they claimed except the land leveling. Their claim to the latter was rejected solely because it was placed thereon subsequent to 1953 without receiving written consent. It then proceeded to go further than the trial court went or either of the parties asked in their briefs and held the land could not be sold unless the value of the improvements given by the opinion to the tenant was first determined.

The opinion clearly recognizes that the tenants' rights in the improvements consist of "either a common law privilege of removal or a right to compensation." It then proceeds to state the privilege of removal would be inadequate and that for land leveling and well holes it would be completely unavailing. The tenant would in such instances "depart empty-handed." To my way of thinking, under the present opinion the schools of the state, which are the real owners of the lands in question, will depart with their lands impaired to the extent of many millions of dollars. From the last report of the Board of Educational Lands and Funds, which is in evidence in the present case, the lands involved in 1964 exceeded 1,600,000 acres.

We start with the well-established principle that the state is a trustee of the school lands and that as trustee it has no right to either give away or encroach upon their value. State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520. Certainly a strained construction should not be placed upon statutes wholly by implication which results in impairing their value in the hands of the trustee.

Under the common law, in the absence of an agreement to the contrary, the tenant may remove improvements made in furtherance of the purpose of the lease provided he leaves the premises in as good condition

as when he received them, but he may not remove improvements which have become an integral part of the property and which cannot be removed without material injury to the premises. 51 C. J. S., Landlord and Tenant, § 394c, p. 1137. This state followed the common law and has held that the tenant had the right to remove improvements at any time before the expiration of the term, Phelps v. Blome, 150 Neb. 547, 35 N. W. 2d 93, or the yielding up of possession, Frost v. Schinkel, 121 Neb. 784, 238 N. W. 659, 77 A. L. R. 1381. There is a presumption that the Legislature, in enacting a statute, did not intend to make any alteration in the common law other than that specifically stated; and it will not be presumed that the common law was repealed by the statutory or a constitutional provision, unless the language naturally and necessarily leads to that conclusion. 15 C. J. S., Common Law, § 20b, p. 633.

The opinion of the court cites a statute of 1867 which provided that an occupant of school lands had an option between receiving the appraised value of his improvements from the purchaser or removing the improvements within 6 months after sale. This statute was repealed by a subsequent section of that statute mentioned in the opinion as having changed it. Laws 1897, c. 71, § 4, p. 331. A labyrinth of statutes dealing with the school lands have been enacted in the past. Some of them purported to change the common law of landlord and tenant in some particular while they existed. Only those in force during the term of the leases before us need concern us. Here it is not necessary to search the record of the past for statutes long since repealed to guide us in the present. We have the common law. "When a statute abrogating a rule or principle of the common law is repealed, the common-law principle or rule is ipso facto revived, unless there is something to show a contrary intent on the part of the legislature." State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W.

676. See, also, 15 C. J. S., Common Law, § 12b, p. 621; 50 Am. Jur., Statutes, § 525, p. 532. I conclude that the common law with respect to the rights of landlord and tenant is in force with respect to the school lands save only as it is changed by presently existing statutes.

In spite of the presumption that the Legislature did not intend to make an alteration in the common law other than specifically stated, the opinion discards entirely the law of landlord and tenant as it applies to the school lands. It does so by citing special statutes which set out specific rights between successive lessees and are clearly applicable to them only. It curtails the right of the owner to dispose of those lands until there has been a determination of the value of the improvements. No present statute is pointed out that purports to change the common law rights or obligations with respect to those lands between landlord and tenant. The statute directing the sale contains nothing to indicate such a change. It does not direct the determination of the value of the tenants' improvements, nor provide for their being compensable on sale. It appears to the writer the legislative intent was to restrict the rights of the lessee to those provided at common law when leasing has ended and a sale is to be made. Who is to pay for the improvements when valued? Surely not the state itself for it should not mingle its funds with those for whom it is trustee. Neither is there statutory authority to invest the school funds therein. Nor should there be since those funds should remain inviolate. It must be the purchaser although the opinion does not say so.

It is obvious that if the land is sold without a determination of the rights of the lessees to the improvements, no purchaser would be inclined to buy a lawsuit. Bidding by those other than occupying lessees would be effectively chilled. In an attempt to avoid this patent danger the decision of the court has postponed a sale until the value of the improvements has been determined. It does not purport to point out how

this is to be ascertained. Either it is left to the trial court or to future legislation. It plainly states, however, the value is to be determined before sale. This would appear clearly to be to the lessee's advantage. The present provisions of law requiring an appraisement between the outgoing and incoming tenant is properly designed to secure a fair valuation. Presumably both are residents of the vicinity where the lands lie, are familiar with the premises, and are cognizant of its worth as well as the character and value of the improvements. The outgoing tenant desires to get as much for his improvements as he can and the incoming tenant to pay no more than required. Their interests and rights are adverse, as they should be. If appealed, the ensuing action is adversary in nature. Who is to see the improvements are not overvalued under the decision of the court? Certainly it is not an outside purchaser who is not yet known. Apparently it is the state as trustee, or the Board of Educational Lands and Funds or its agents. Their interest can be said to be adverse only by conceding that a high valuation will result in loss to the school lands. Who in the present case will be in a position to give evidence concerning the improvements and their value? Obviously the present tenants who with their ancestors have been in possession of the premises for 42 years. Who will be in a position to testify or make claim to the contrary? The board and its agents have changed from time to time. No one else will be interested.

Laws 1953, chapter 255, section 1, page 862, formerly section 72-240.06, R. R. S. 1943, is cited in the opinion of the court setting out the list of property which then passed on appraisement from the old tenant to the new. The list consists of buildings, fencing, wells, windmills, irrigation improvements, dams, drainage ditches, trees, plowing for future crops, and growing crops.

In cases considered by this court on appeal between tenants, the outgoing tenant was wont to equate the

worth of such improvements more to costs than to value. This perhaps arises because most of the cases involved growing small grain crops on the first of January. There was generally no market for them and it was difficult to say what their value was. The outgoing tenant testified to the costs of preparing the ground and sowing the grain and then generally placed a value corresponding with the costs. This testimony was permitted because costs do have some relationship to value. O'Neil v. Haarberg, 179 Neb. 531, 139 N. W. 2d 217.

In the list of properties set out there are many improvements, the value of which will be difficult to fix. Who knows the value of wells, irrigation improvements, dams, drainage ditches, and land leveling as they are separately related to the land on which they are placed? To do so it would be necessary to know the productivity of the lands involved before and after the improvements were effected. The Board of Educational Lands and Funds has been collecting cash rent and had nothing to do with the crops raised. The tenant occupied the premises under long-term leases and generally placed them there for his own profit or convenience during the term. He can testify as to the improvement of the premises, their costs, and value.

Trees are planted as small shoots. They were often procured free from the federal government. In this instance, costs are forgotten, but having grown from roots in the school lands they are said to be of great value. In the case of the windbreak, the land under it has little value where the windbreak is divorced from it and must be separately purchased.

I am fearful that with the means at hand to augment the value placed upon the improvements, any appraisal of them will become overvalued.

The court's opinion holds that prior to September 14, 1953, no written approval by the Board of Educational Lands and Funds was required for the installation of whatever enumerated improvements the tenant desired

to place upon the premises. It holds they are compensable regardless of whether they were only suitable for the lessee's personal needs or were required by the interests of good husbandry and the proper operation of the land. Motives for overimprovement were not lacking. First, they could be used in connection with the operation of nearby lands privately owned. Second, their presence often chilled bids at a subsequent leasing. Third, if a new tenant outbid the former tenant, he was assured that as long as the leasing arrangements were continued he would receive the value of the improvements. Juries were often inclined to accept the outgoing tenant's valuations.

Sections 72-257 and 72-258, R. S. Supp., 1965, providing for the sale of the school lands requires an appraisal of the land only for the sale purposes and provides that the premises be not sold for less than the appraisal. If a separate valuation of improvements is required to be paid, it is apparent that any excess of value over the appraisal that a bidder might be inclined to pay for the land would go to compensate the lessee. It is equally obvious that if the valuation of improvements is swollen the real value of the school lands would be seriously impaired. If the sum of the two appraisals exceeded the bid the sale would be blocked.

Why did not the Legislature provide for the appraisal of the improvements in the sections providing for sale? Surely an appraisal of many types of improvements would require that guidelines be supplied concerning depreciation as well as obsolescence which occurs not only to buildings but to other changes made in the land itself. In my opinion, no appraisal of improvements was required because the Legislature considered that the common law provided the sole remedy of the lessee with respect to his improvements when the premises were sold. The leasing is at an end. The special statutes governing solely the rights between the successive lessees end with it.

The statutes enacted by the trustee should not be construed as eroding the value of the trust property unless they clearly require such a determination. They do not do so here. Much less should this appellate court in an equity case in which it sits as a court of chancery and good conscience dealing with trust property permit itself by a strained interpretation to do so.

If the lessees of the state school lands are restricted to the removal of such of their improvements as can be done without injury to the freehold they will of course not receive as much as they had hoped, but in my opinion they will have received all that the law of the land entitles them to receive. I am not impressed by the opinion of the court which seems to infer that they would be badly treated and go "empty-handed." In the present case, the plaintiffs and their ancestors before them have leased these premises for 42 years. For the first 25 years they agreed to pay a little over 25 cents an acre a year as rent. For another lease for a period of 25 years, which however was executed before the end of the first term, they paid a little less than 25 cents an acre a year for their use. The record does not show what they have paid since. It was based upon an appraisal not in the record.

The record does show, however, that the lease rentals and penalty interest on the school lands under agricultural leases amounted to $4,798,436.09. This is for the biennium from July 1, 1962, to June 30, 1964. The record as previously stated shows these lands included more than 1,600,000 acres. The record further shows that the cash bonuses from the agricultural lease sales on the common school lands were $2,313,359.90 during this same biennium. The amount of these bonuses clearly shows that the rental of the lands involved were lower than they should have been and were based on appraisals that were inadequate. Otherwise such a great sum would not have been received in bonuses for either new or renewal leases. The improvements were

made, in my opinion, largely for the convenience and for profitable farming of those who held the premises under long-term leases. Their addition was not reflected in the rentals at least for years to come.

I would affirm the judgment of the trial court insofar as it purports to place the title to the improvements in the lessees. That was all the trial court did. That is all we were asked to do by either party. However, I realize that the court in its opinion felt that the far-reaching effects of its decision demanded that something be done to clarify the impending sales of these vast holdings. That being required, I would simply state that the lessees be permitted to remove such of their improvements as could be removed without damage to the freehold in accordance with the common law. Inasmuch as time-consuming litigation intervened between the end of the leasehold term and the present, I would have given them a reasonable period to do so.

I am authorized to announce that Spencer, J., and Colwell, District Judge, join in this dissent.

CARTER, J., concurring.

I agree fully with the holdings of the majority opinion. In view of the contentions advanced in the dissenting opinion, it seems necessary that they be answered and that the opinion of the court be clarified as it relates to such contentions.

It is argued that the common law of landlord and tenant controls certain phases of the case, particularly as it relates to the rule that improvements belong to the landlord at the termination of a lease in the absence of an agreement to the contrary. Since 1867, statutes regulating the selling and leasing of the public school lands of the state have been in force. The history of the legislation shows without much question that the legislative purpose was to encourage the making of such improvements to enhance the value of the public school lands for agricultural purposes. Over the years, the state has never assumed the cost or value of improve-

ments but has consistently sought to protect the interests of lessees in placing improvements on school lands during the terms of their leases. This protection has been afforded by requiring a new lessee to pay the old lessee for the latter's improvements located on the land. In case negotiations failed, the value was to be determined by a board of appraisers subject to a right of appeal to the courts. In any event, the new lessee was required to acquire and pay the old lessee for the improvements. The problem was confused during certain periods of its legislative history when the Legislature provided as an alternative that improvements could be removed by the old lessee within 6 months after the termination of his lease, a provision in conflict with the common law rule that improvements could be removed during the term of the lease if pursuant to an effective agreement. From time to time the Legislature defined the term "improvements" by adding new forms of land benefits which were not recognized as "improvements" within the common law rules applicable to landlord and tenant. The remedy provided by applicable statutes was a form of compensation, as compulsory as condemnation under eminent domain, if negotiation failed. The state claimed no interest in the improvements and affirmatively preserved a right in the lessee in improvements listed in the statutes. As an example, the Legislature at various times provided that the following were improvements: Irrigation improvements, dams, drainage ditches, plowing for future crops, conservation terraces, assessments paid to any irrigation district, trees, and sod breaking. None of these were recognized as improvements within the common law of landlord and tenant. The imposition of the value of improvements upon a new tenant is contrary to common law rule. I submit that the purpose, spirit, and public policy involved was in complete conflict with the common law of landlord and tenant, is in complete derogation thereof, and that the common law has no application to the issues

here raised. The rights or liabilities created and the remedies provided are wholly statutory and must be looked to for the solution of the problems before us.

At common law the landlord was the owner of improvements put on the land by the lessee unless an agreement was made for their removal as the property of the lessee and their removal was had during the term of the lease. But here the state has never had any interest in the improvements and has never claimed an interest therein. In fact, the state through legislation has continuously recognized the lessee placing improvements on school lands as having some sort of title or interest in them. The nature of this interest or title is an intriguing one. The lessee certainly does not have what we might term a fee title. He does not have the muniments of such a title under the statutes. He cannot remove improvements at will for the simple reason that many of them cannot be removed. He cannot sell to whom he pleases because his sale is limited to the successor lessee. He cannot demand his price because when negotiations fail he is forced to accept the remedy in existence when he placed them on these public lands, to wit, the appraised value or the amount fixed on appeal to the courts from the appraisement. The interest of the lessee is therefore a limited title or, what would probably be more accurate, a compensable interest in the improvements on the leased lands.

It is suggested in the dissenting opinion that the Legislature may rightfully invoke the common law rules relating to landlord and tenant, and allow the state to proceed to sell the improvements as its own. This cannot be done for two reasons: First, because the common law is not applicable, and, second, because a recognized compensable interest in a lessee to an incoming lessee cannot be treated as belonging to the state on a sale of the school lands without violating the constitutional requirements of due process. To hold that a lessee has a compensable interest in improvements on a new

lease to a third party and that he has no compensable interest on a sale to such third party would create a legal anomaly supported neither by logic nor legal sanction.

The dissenting opinion questions the authority of this court to restrain the sale of school lands until the interests of lessees in improvements have been determined. The issue thus raised is a very important one and requires further discussion and clarification. The public school lands of this state are held in trust for educational purposes. Art. VII, § 9, Constitution of Nebraska. The Constitution having provided that school lands are held in trust for educational purposes, the Legislature is required to administer the trust under the rules of law applicable to trustees acting in a fiduciary capacity. A breach of the duties and functions imposed upon the state through the Legislature as a trustee by virtue of its constitutional status as such is a violation of the Constitution itself. The Legislature is authorized to provide by statute the terms upon which the public school lands of the state may be sold, but such terms must be consonant with the duties and functions of a trustee acting in a fiduciary capacity. It is the duty and function of a trustee to avoid unnecessary risks of loss and at the same time to obtain a maximum return to the trust estate consistent with the avoidance of such risks. State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520.

In the instant case, a tract of school land was offered for public sale. Included in the sale were the improvements on the land in which the state had no monetary interest. The sale of improvements by the state under such circumstances could well result in a loss to the state and a depletion of the trust funds. Such a sale amounts to a conversion of the improvements by the state. The sale by the state of the lessee's compensable interest in the improvements, the value thereof to be determined at some future time, could well result in

great benefit to the lessee and a corresponding loss to the trust fund. In the exercise of its power to protect the interests of beneficiaries of trusts, and particularly the beneficiaries of a public trust, the court is authorized and, I think, required to determine the method of sale in the instanst case be enjoined. To permit the continuance of such sale, and thus allow intervening rights of bidders and others to accrue, is not for the best interests of the trust. The sale of lands by the state along with improvements not owned by the state, especially before their value is determined, constitutes an unreasonable risk of depletion of the trust fund. The possibility of bid chilling, and other factors tending to reduce the return of the sale, is alone sufficient to warrant the intervention of a court of equity.

A requirement that the value of the improvements must be determined prior to a public sale of school lands immediately raises the question as to how it can be done. It would seem that the Board of Educational Lands and Funds has a sufficient interest, on a failure of negotiation, to have the issue determined in a declaratory judgment proceeding between the board and an outgoing lessee. Or the Legislature could provide a new remedy meeting the requirements of due process. The more important issue is the determination of the compensable interest of the lessee and the type of evidence required to support a judgment.

I am of the opinion that the cost of the improvements to the occupying lessee is generally of little evidentiary value, although it may constitute a maximum that may be recovered. The determination of the value of improvements on a cost basis overlooks depreciation, obsolescence, overimprovement, and a possible want of benefit to the land. Some of the improvements listed by the statute may be paid for in whole or in part by the government as a matter of public policy, and should not accrue to the benefit of the occupying lessee. Certainly any value added to the land itself, as distinguished from

the actual value of the improvements, is the property of the trustee. The compensable interest of the lessee should not be permitted to exceed the value of the improvements to the land at the time of the termination of the occupying tenant's lease. Compensation for improvements must be consistent with the overall purpose, spirit, and public policy involved. Any judgment which in effect invades the trust res cannot be sustained. An examination of the legislative history of the applicable statutes reveals that the Legislature never intended that the state would ever become liable for the cost or value of improvements or that the trust fund should become liable for any part thereof, directly or indirectly.

The dissent expresses a fear that the trust fund will be depleted because of the necessity of determining the value of the improvements before a sale of the school land on which they are located. The danger of a depletion of the value of the school lands or the amounts received from their sale is a matter of extreme concern to the majority as well as the minority. But to merely affirm the holding of the trial court that occupying lessees have a financial interest in the improvements and permit the public sale to continue will lead the state into possible loss to the state from which it cannot extricate itself. The state, then, will have sold the improvements which it does not own and obligate itself to the payment of whatever amount subsequent determination may develop. That such a subsequent determination may be in excess of any reasonable amount contemplated by the trustee is one of the fears that can be eliminated before sale only. The time to protect against such possible losses to the trust property is before the sale, and not after. The labyrinth of statutes on the subject, and the interpretations to which they are subject, is reason enough for a determination of rights before liabilities have been assumed. It seems to me that the protection of the trust res is the ultimate objective

of both the majority and the minority. The differences arise only in the manner of accomplishing this result.

I have the view that the problems must be largely determined before sale in order that the trustee will have an opportunity to determine their actual value; bidders will know with some certainty what they are buying; and occupying tenants will have their rights determined without the necessity of subsequent costly litigation. It is my opinion that, unless such a disposition is made, the entanglements will become more complex and, in all likelihood, with great loss to the common schools of the state. The scope of the powers of a court of equity over trusts has been stated as follows: "A court of equity has been said to have the capacity of a universal trustee. The scope of such judicial supervisory control includes, of necessity, any matter which concerns the integrity of the trust res—its administration, its preservation and its disposition, and any other matter wherein its officers (trustees) are affected in the discharge of their duties." 54 Am. Jur., Trusts, § 276, p. 219.

Some contention has been made that occupying lessees have had very advantageous lease agreements over the years and that this mitigates the interest of such lessees. That this has been permitted to occur cannot be disputed. But this does not mean that all lessees have profited at the expense of the trust in this manner. The rent paid on a lease and the amount due for improvements have no legal relation one to the other, and the low rent leases received by some cannot operate to the disadvantage of all lessees who have placed improvements on school lands in reliance on existing statutes.

It is my conclusion that the courts have a duty and responsibility to guard the public school lands, and the funds derived from their sale and rental, against loss. This duty includes any procedure which involves any unreasonable risk or leads the trustee into the expense of subsequent litigation. It is the duty of the state to avoid costly pitfalls that can result in the depletion of

the trust fund. The responsibility also rests upon the courts to see that the state performs its duty as a trustee. Since the majority opinion is consistent with these views, I support it as a correct disposition of the case before us.

Boslaugh and McCown, JJ., join in this concurrence.

SPENCER, J., dissenting.

I concur fully with the dissent of Judge Brower herein. I deem it necessary, however, to point out that except for the references to the trust character of school lands and a reference to the scope of the powers of a court of equity in 54 Am. Jur., Trusts, § 276, p. 219, with which I fully agree, the concurring opinion is wholly lacking in authority. I suggest this lack of authority buttresses the fact that the law is as set out in the dissenting opinion. If it could be successfully refuted, it would not be necessary to rely on mere assertions.

I believe it is important that we recognize the issue involved herein. We are not here concerned with the history of the school land legislation. We concede the legislative intent to grant rights to lessees in the improvements, but question its power to grant an interest of any nature in the land. This is the result unless the common law rule on improvements is applied. We are not concerned with rights as between lessees, but rather as to whether a trustee may grant rights to the detriment of his cestui que trust. It is the law of trusts which is controlling herein.

As set out in Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653: "The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alienate the lands or any part thereof except as allowed by the Enabling Act and the Constitution."

The law applicable herein is well stated in State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520: "A trustee acts in a representa-

tive capacity and persons dealing with him are bound to be cognizant of his powers. A trustee is required to dispose of trust property upon the most advantageous terms which it is possible for him to secure for the benefit of the cestui que trust whom he represents. The rule is no different in the leasing of property of a trust estate." In that same case, we said: "The state in acting as a trustee is subject to the same standards, and when its status as a trustee is fixed by the Constitution a violation of its duty as a trustee is a violation of the Constitution itself."

That the Legislature has the power to provide the method of administering the public school lands of the state as a trust is without question, but the method provided must be one which is within the law governing the administration of trust estates. The designation of these lands as a trust in the Constitution has the effect of incorporating into the constitutional provision the rules of law regulating the administration of trusts and the conduct and duties of trustees. A breach of trust in such a situation is in effect a violation of the constitutional provision and has the effect of invalidating the legislation authorizing the breach. State ex rel. Ebke v. Board of Educational Lands & Funds, *supra*.

The effect of the various acts referred to in the majority opinion is to confer special benefits upon the holders of leases of school lands to the detriment of the beneficiaries of the trust. This is the construction placed upon the statute by the majority and the concurring opinions when they require a determination of the value of the so-called improvements and in effect force the trustee to buy them before sale. It is my contention that the state is powerless to gratuitously create liens in any form on public school lands. I contend further that any lessee dealing with the state in its trust capacity is conclusively chargeable with knowledge of the extent of its power.

It seems elementary that a strict interpretation must

be placed upon all statutes, agreements, and proceedings for the protection of beneficiaries of our public school lands. This fact, it appears to me, is wholly ignored in both the majority opinion and the concurring opinion. The majority opinion holds that lessees have a property interest. The concurring opinion states: "From time to time the Legislature defined the term 'improvements' by adding new forms of land benefits which were not recognized as 'improvements' within the common law rules applicable to landlord and tenant. The remedy provided by applicable statutes was a form of compensation, as compulsory as condemnation under eminent domain, if negotiation failed." I have no quarrel with these holdings when interpreting rights as between lessees. As I interpret the improvement statutes, they contemplate, and I believe can only contemplate, the relationship between the old and the new lessees. The state merely serves as an intermediary between the two lessees. I seriously disagree with any interpretation that would grant lessees any "land benefits" as against the trust, for the simple reason that the Legislature is without power to create or grant such benefits. What the majority opinion does is to diminish the value of school lands by substituting the state for a new lessee. This is not only judicial legislation, but also legislation in violation of a constitutional prohibition.

On the issue of the growing crop, the majority opinion in addition violates the express terms of the lease, which provides, "that the premises will be surrendered at the expiration of the lease." Lessees herein planted 25 acres of wheat in the fall in 1965, subsequent to the passage of the school land sales law, and at a time when the lease by its terms would expire December 31, 1965, or long before the crop could mature.

As the majority opinion states, at common law a tenant is not entitled to crops after the expiration of a lease. In Peterson v. Vak, 160 Neb. 450, 70 N. W. 2d 436, 51 A. L. R. 2d 1221, this court held that a lessee

has an absolute right to plant crops or use the land until the lease expires, but that he is chargeable with knowledge that any crop which has not matured by the termination of the lease would be his loss. The majority opinion, ignoring this case and the express terms of the lease, holds that in the interest of good husbandry this rule should not apply. The obvious effect of the majority opinion is to give the lessees a lien on the land for the crop which matured 6 months after the expiraion of the lease, when they deliberately planted it knowing the land was to be offered for sale.

For the reasons given, I cannot agree with the majority opinion herein.

ALBIN BARTOSH, APPELLANT, V. RAY SCHLAUTMAN, DOING BUSINESS AS SCHLAUTMAN TRANSFER COMPANY, APPELLEE.
147 N. W. 2d 492

Filed December 22, 1966. No. 36281.

1. **Automobiles: Negligence.** Where reasonable minds may differ on the question of whether a motorist exercised the ordinary care required of him under the circumstances, the issue of negligence is one of fact for the jury.
2. ———: ———. Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights.
3. ———: ———. Exceptions to the general rule that a motorist who cannot stop his automobile in time to avoid a collision with an object within the range of his vision is negligent as a matter of law embrace those situations where reasonable minds might differ as to whether the motorist was exercising due care under the particular circumstances.
4. ———: ———. An exception to such general rule occurs when the object struck is the same color as the roadway and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision.
5. ———: ———. The general rule that a motorist who cannot stop his automobile in time to avoid a collision with an object within the range of his vision or lights is negligent as a matter of law is not an automatic rule of thumb, nor a rigid

formula to be applied regardless of circumstances. The applicability of the rule, as a matter of law, depends on the individual circumstances and is for the court's determination.

6. ———: ———. Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases.
7. **Trial: Appeal and Error.** It is not error to refuse a requested instruction if the legal principles therein announced are either incorrectly stated or inapplicable to the issues involved.
8. **Trial.** In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can be reasonably deduced therefrom.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Richards, Yost & Schafersman, for appellant.

Edward Asche and Sidner, Gunderson, Svoboda & Schilke, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and NEWTON, District Judge.

MCCOWN, J.

This is an action for personal injuries and property damage sustained by the plaintiff and appellant, Albin Bartosh, in a collision with a truck owned by the defendant and appellee, Ray Schlautman, doing business as Schlautman Transfer Company. Defendant and appellee filed a cross-petition for damage to his truck, and at a trial before a jury was awarded a verdict on his cross-petition. Judgment was entered accordingly, motion for new trial was overruled, and plaintiff appealed.

The accident occurred on the evening of Sunday, November 8, 1964, on highway 91, a short distance east of Dodge, Nebraska. Plaintiff had been operating a farm tractor and cornpicker in an adjacent field, pulled on to the highway with the tractor, mounted picker, and towing a farm wagon loaded with ear corn. He attempted

to shift gears and the gears jammed so that he came to a stop in the right-hand lane of the hard-surfaced highway. He immediately proceeded to repair the tractor. There were no flares placed and no lights upon plaintiff's vehicle. While repairing the tractor, the wagon was struck from the rear by defendant's truck.

The evidence relating to whether or not the accident happened before or after a half hour after sunset, the extent of the darkness, and the extent of visibility on the highway was conflicting.

During the time that plaintiff's vehicles were stalled upon the highway, one other automobile had approached from the rear and passed him on the left. A second had approached from the rear and driven into the right-hand ditch to avoid colliding with the plaintiff's vehicles. The third vehicle to approach from the rear was defendant's truck.

Plaintiff requested the following instruction: "You are instructed that the driver of a motor vehicle must at all times have the same under control so that it can be stopped within the range of the driver's vision, or the range of its lights." This instruction was refused, but the court did instruct generally on the duties of a motorist regarding "control" and "lookout." Pertinent parts of the court's instruction No. 11 are as follows: "It is the duty of drivers of vehicles to keep such diligent watch and lookout and have their vehicles under such reasonable control at all times as will enable them to avoid collision with others, assuming that such others will also exercise ordinary care. * * * Each driver must use such senses of sight and hearing, and such other instruments as are at his command, to use ordinary care to avoid an accident, and it is the duty of drivers of vehicles to look and see that which is in plain sight."

Plaintiff insists that the trial court committed error in failing to give the instruction requested.

Where reasonable minds may differ on the question of whether a motorist exercised the ordinary care required

of him under the circumstances, the issue of negligence is one of fact for the jury. Weisenmiller v. Nestor, 153 Neb. 153, 43 N. W. 2d 568; Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422; Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182.

Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. Robins v. Sandoz, 175 Neb. 5, 120 N. W. 2d 360; Pool v. Romatzke, 177 Neb. 870, 131 N. W. 2d 593; Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

Exceptions to the general rule that a motorist who cannot stop his automobile in time to avoid collision with an object within the range of his vision is negligent as a matter of law embrace those situations where reasonable minds might differ as to whether the motorist was exercising due care under the particular circumstances. Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571.

An exception to such general rule occurs when the object struck is the same color as the roadway and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision. Weisenmiller v. Nestor, *supra*.

In this case, plaintiff specifically alleged a violation of the general rule and the defendant specifically alleged facts within the exception to the rule. The so-called general rule is a rule of law which, from its inception in Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473, has been stated as being subject to many exceptions. The exceptions are discussed and referred to in Robins v. Sandoz, 177 Neb. 894, 131 N. W. 2d 648, and in Guynan v. Olson, supra. To say the least, it is difficult to determine the exact extent to which the exceptions have undercut the general rule, but we have consistently announced our adherence to it. The general rule is not an automatic rule of thumb nor a rigid formula to be applied regardless of circumstances. The applica-

bility of the rule, as a matter of law, depends on the individual circumstances and is for the court's determination. Where an exception clearly applies, the general rule does not apply. Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases.

The evidence here established that the highway surface was a light color, or gravel color, as referred to by one witness; that the back of the wagon was of new shiplap or lumber color; and that there were no lights of any kind on the wagon, the corn picker, or the tractor. There were only two witnesses who testified as to the appearance of the wagon from the rear prior to the accident. The witness who approached at an undisclosed time before the accident testified that he could see something unusual on the highway from an undisclosed distance, but that he "couldn't tell at first what it was until we went by and then I seen it. * * * It kind of looked—a fellow couldn't tell exactly. It looked like something in the way but exactly what it was I didn't know until I got closer."

The only other witness as to visibility was an individual who approached from the rear only moments before this accident, was forced to drive his vehicle into the ditch to avoid colliding with the wagon, and was still in the ditch when this accident happened. He testified that he thought he saw something in the road that was not definite but was "more of a shadow"; that he didn't think he could stop and, therefore, went into the ditch; and that at the time he took to the ditch, it appeared like a shadow in the shape of a door. He also testified that the color blended right in and that he could not see it until "you were too close to be able to do anything else." All of the automobiles had their lights on.

Under such circumstances, the exceptions involving visibility of the object clearly applied rather than the

general rule. Under the evidence here, the giving of the instruction requested by the plaintiff would not only have been confusing to the jury, it would have been prejudicial to the defendant and did not correctly state the law upon the issue presented by the pleadings and the evidence. It is not error to refuse a requested instruction if the legal principles therein announced are either incorrectly stated or inapplicable to the issues involved. Frazier v. Anderson, 143 Neb. 905, 11 N. W. 2d 764.

The plaintiff made no specific request for any other explanatory instruction and the instructions given by the court fairly and properly presented to the jury the material matters and issues of negligence and ordinary care. The instructions specifically submitted to the jury the allegation that the defendant's driver was negligent in failing to drive so as to be able to stop within the range of his vision as one of the material allegations, and authorized a verdict for the plaintiff if the jury found the defendant's driver guilty of negligence in that respect. The instructions taken as a whole fairly submitted the issues of negligence and contributory negligence to the jury. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can be reasonably deduced therefrom. Schmeeckle v. Peterson, 178 Neb. 476, 134 N. W. 2d 37.

It follows that the judgment was proper and is affirmed.

AFFIRMED.

WHITE, C. J., dissenting.

It is the duty of the trial court, whether requested to do so or not, to instruct upon all of the material issues presented by the pleadings and supported by the evidence. This rule is so fundamental as to not require any citation of authority. As the majority opinion points

out, the plaintiff specifically alleged a violation of the general rule that it is negligence for a motorist to drive an automobile on a highway in such a manner that he cannot stop or turn aside in time to avoid a collision with an object within the range of his vision. This is familiarly called "the range of vision" rule. As the majority opinion points out, this allegation was traversed by the defendant in which he specifically alleged facts within the exceptions to the general rule. The crucial issue, if not the only issue in the case, was the visibility or discernibility, under the circumstances, of the plaintiff's tractor and wagon. It may be said that the whole case revolved around the determination of this issue. Whatever may be the language in some of our cases attempting to generalize the exceptions, the rule with reference to the application of the exceptions in this case is clearly stated in Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571, as follows: "In the application of this rule (the range of vision rule), we have applied the exceptions to the situations where the object, obstruction, or depression is of the same color as the roadway, and for that reason, or for other sufficient reasons, *cannot be observed* by the exercise of ordinary care in time to avoid a collision." (Emphasis supplied.) The issue as to visibility or discernibility of the tractor and the wagon in this case was in hot dispute. The majority opinion does not challenge the conclusion that the question was for jury determination. Reasonable minds could differ as to whether the tractor and wagon could be observed by the exercise of ordinary care in time to avoid a collision. The parties pleaded the rule and the exceptions thereto, and there was evidence to support a finding either way by the jury. It was, therefore, the court's duty irrespective of any request to properly instruct the jury as to the rule and as to the exceptions thereto, as applicable to this case. And yet the court, by a circuitous method of reasoning, comes to the conclusion that although the rule and the exceptions are pleaded by the

parties and supported by the evidence that it is not necessary to instruct the jury as to the applicable rules pertaining thereto.

The plaintiff in this case requested an instruction which consisted of a statement of the general rule without including therein the applicable rule with reference to the exceptions. There was evidence, of course, supporting the existence of the exceptions. Conceding, therefore, that it would have been error to give the requested instruction, this would in no way have absolved the trial court from the duty to instruct as to the law upon material issues pleaded and supported by the evidence and which in fact were submitted to the jury for consideration. Surely, if an erroneous instruction was requested as to the elements of lookout or control in a negligence case, it could not be contended that such an erroneous request would absolve the court from the duty of properly instructing upon the issues of lookout or control.

The majority opinion states: "Where an exception clearly applies, the general rule does not apply." The point is that this question is for the jury to determine under all of the circumstances of the case. This court has no right or power, as a matter of law, to determine that an exception "clearly applies" in this case. The evidence was conflicting. There was evidence to support the existence of the exceptions and to support a finding that the object was not visible or discernible by the use of ordinary care. Surely the jury was entitled to determine this essential fact of the case. The majority opinion holds, in effect, that as a matter of law this case comes within the exceptions to the rule. Although submitting the case to the jury, the effect of the holding is to determine, as a matter of law, that the tractor and wagon could not be discovered by the exercise of reasonable care under the circumstances. This is clearly an invasion of the province of the jury. The range of vision rule is certainly not merely an abstract formula

for the technical application of this court in the determination of whether a case should be submitted to the jury or not. In Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870, it is stated as follows: " 'The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it.' Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106." The rule is one of substantive law governing the degree of lookout, control, and speed of drivers on highways. It is as much a part of the law as any statute. Could it be argued that if this rule happened to be enacted into statute, that the court would not be required to inform the jury of its application when the issues as raised by the pleadings and the evidence supported its application?

The majority opinion states, "Under such circumstances, the exception involving visibility of the object clearly applied rather than the general rule." With this statement, I disagree. The evidence as to visibility was conflicting. There was evidence supporting a determination by the jury that the facts came within the exceptions and that the tractor and wagon were not discernible by the exercise of ordinary care and there was evidence to the contrary. The jury had a right to determine that the object was visible and a right to know what the applicable law was in the event that it determined that the rule applied rather than the exceptions.

It would seem that the range of vision rule, by the holding in this case, is now withdrawn from jury consideration in the State of Nebraska. If any evidence is introduced supporting the exceptions the rule is destroyed as far as the jury's consideration of it is concerned. Moreover, the confusion that will result is apparent from this case. This court in this case specifically holds that the range of vision rule was submitted to the

jury and that this was proper. And yet, at the same time, this court holds that it was not necessary or proper for the court to instruct the jury as to the rules of law applicable. The "range of vision" rule was adopted in 1928 in the case of Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473. Since that time there appears to be no question in the cases where the evidence is conflicting that the issues should be submitted to the jury together with appropriate instructions covering the rule and the exceptions. See Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612. The case presented here is a typical rear-end accident case. Whether the rule applied or not depended upon the visibility of the object. This issue was submitted to the jury and the jury was entitled to know the applicable law pertaining thereto.

Brower, J., concurs in this dissent.

NEWTON, District Judge, dissenting.

I respectfully dissent from the majority opinion entered in this cause. I am in agreement with the statement of facts set forth in the majority opinion but not with the conclusions of fact and applicable law drawn therefrom.

The undisputed evidence shows that plaintiff's tractor stalled on the highway due to a jamming of the gears; and that plaintiff lost no time in attempting to make repairs. Under such circumstances no negligence could be attributed to him due to stopping on the highway. The primary issue in this case as shown by the pleadings and the evidence was the question of visibility of plaintiff's unlighted vehicle. I am in agreement with the following statement found in the majority opinion: "The evidence relating to whether or not the accident happened before or after a half hour after sunset, the extent of the darkness, and the extent of visibility on the highway was conflicting." The record also shows and it necessarily follows that the evidence regarding discernibility of the unlighted farm equipment on the highway was also conflicting. Under such circumstances a jury

question on this issue was definitely presented, and it being the determining issue in the case it would appear that the court must necessarily instruct thereon. The majority opinion states the general rule that: "Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights." It further states that: "Where the general rule does not apply as a matter of law, the determination of negligence is for the jury * * *." I agree with these statements, but I emphatically dissent from the statement that in this case "the exception involving visibility of the object clearly applied rather than the general rule." After conceding that the evidence on the factors affecting visibility of the object were conflicting, the majority opinion apparently arrives at the conclusion that the evidence justifies a finding as a matter of law that the general rule did not apply. The conclusion so arrived at is clearly contradictory of the facts conceded to have been established, and apparently this is the basis for the statement contained in the majority opinion to the effect that it is not error to refuse a requested instruction if the legal principles therein announced are either incorrectly stated or inapplicable to the issues involved. Obviously the majority opinion bases this statement on a conclusion that the facts concededly contradictory did not present a jury question regarding the visibility of plaintiff's unlighted vehicle, and cites in justification thereof certain statements of two witnesses, while completely disregarding other contradictory testimony. In other words on the basis of the findings set forth in the majority opinion no jury question was presented, but a verdict should have been directed against the plaintiff as a matter of law, again notwithstanding that it is conceded that the facts involving visibility were contradictory.

The instruction requested by plaintiff on the general rule correctly stated the legal proposition involved, and,

if as pointed out, the evidence was sufficient to present an issue on the question it should have been given. Again I point out that this question of "visibility" was the determining issue in this case. The mere fact that plaintiff's requested instruction did not also present a request for an instruction on the exceptions to the general rule is no justification for refusing the instruction. There is no law of this state that requires a litigant requesting an instruction to present any other than the ones in which he himself is interested. If other instructions are required it is up to the opposing litigant to request them or for the court to supply them.

The failure to instruct on the single most important issue in this case scarcely meets with the following requirement: " 'The purpose of instructions is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, they should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired.' " Fulmer v. State, 178 Neb. 20, 131 N. W. 2d 657. The question of visibility being the determining issue in the case, the jury was entitled to have the law pertaining thereto set before it in proper instructions, and this necessitated an instruction on the general rule and also on the exceptions thereto; yet nowhere in the instructions given are these rules of law set forth.

The rejection of the requested instruction and the failure to instruct on the principles mentioned was clearly error. Refusal to give an instruction applicable to facts in evidence not covered by other instructions is error. First National Bank v. Carson, 30 Neb. 104, 46 N. W. 276; Guinard v. Knapp-Stout & Co., 95 Wis. 482, 70 N. W. 671; People v. Jacks, 76 Mich. 218, 42 N. W. 1134. It is error to refuse an instruction warranted by the testimony, and which contains a correct statement of the law of the case, the principles of which have not been covered by the charge of the court. Powder River Live

Stock Co. v. Lamb, 38 Neb. 339, 56 N. W. 1019; Boice v. Palmer, 55 Neb. 389, 75 N. W. 849; First National Bank v. Carson, *supra;* Hyndshaw v. Mills, 108 Neb. 250, 187 N. W. 780; Pearse v. Loup River Public Power Dist., 137 Neb. 611, 290 N. W. 474; Fulmer v. State, *supra.*

It is the duty of the court to submit to the jury all material issues presented by the pleadings which find support in the evidence. Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714; Enterprise Co., Inc. v. Sanitary District No. One, 176 Neb. 271, 125 N. W. 2d 712; Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538.

The decisions of this court are replete with statements to the effect that if a litigant desires a more specific instruction on any subject other than that given by the trial court, he must make request therefor. In this case such request was made, and assuming for the moment that the instructions given by the court sufficiently covered the determining feature of "visibility" of plaintiff's vehicle in the absence of a request for a more specific instruction, it was nevertheless error to refuse the more specific instruction when requested. "When instructions are requested by either party to a suit, which correctly state the law upon the issues presented by the pleadings and the evidence received during the trial, it is error to refuse them, unless the points are fairly covered by other instructions given by the court on its own motion." Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501. See, also, Strubble v. Village of DeWitt, 81 Neb. 504, 116 N. W. 154. "If the statements of the charge to the jury upon material matters are general, an explanatory instruction which is pertinent and applicable to the situation should be given if requested. It is error to refuse an instruction warranted by the law and the evidence not covered by other instructions given." Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749. See, also, Crosby v. Ritchey, 56 Neb. 336, 76 N. W. 895. In rejecting the request for a more specific instruction

which was made by plaintiff, this court has laid down a new rule to the effect that it is entirely discretionary with the trial court whether or not a more specific instruction should be given upon request therefor, and in effect is saying to litigants that it is a waste of time to make application for such specific instructions.

IN RE APPLICATION OF NEYLON.
JOHN E. NEYLON, DOING BUSINESS AS NEYLON BROS. FREIGHT LINES, APPELLANT, V. PETERSEN & PETERSEN, INC., ET AL., APPELLEES.

147 N. W. 2d 488

Filed December 22, 1966. No. 36303.

1. **Public Service Commissions: Motor Carriers.** The Nebraska State Railway Commission may clarify or interpret a certificate of public convenience and necessity if it is indefinite, ambiguous, or uncertain in its terms or provisions.
2. ———: ———. The words "and occasionally to and from various points within the State of Nebraska at large" contained in the route termination clause of a certificate of public convenience and necessity, mean that, in addition to the general authority granted, occasional routings between the stated points of origin to and from other points in the state at large are authorized.
3. ———: ———. The refusal of the Nebraska State Railway Commission to clarify or interpret a certificate of public convenience and necessity on the ground that no actual injury was alleged which authorized the intervention of the commission is not a determination on the merits, and will not support a claim of previous determination.
4. **Courts: Public Service Commissions.** Courts are without authority to interfere with the findings and orders of the Nebraska State Railway Commission, administrative or legislative in character, except when they exceed its jurisdiction or are arbitrary.

Appeal from the Nebraska State Railway Commission. Affirmed.

James E. Ryan, Hyman B. Evnen, and Donald L. Stern, for appellant.

Nelson, Harding, Acklie, Leonard & Tate and Viren, Emmert & Epstein, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

CARTER, J.

John E. Neylon, doing business as Neylon Bros. Freight Lines, applied to the Nebraska State Railway Commission for a clarification or interpretation of his certificate of public convenience and necessity, or, in the alternative, for an extension of his certificated authority. Protests were filed by some 11 competing motor common carriers operating in Nebraska intrastate commerce. After a hearing, the commission denied the application and Neylon has appealed.

The evidence shows that Neylon purchased the authority in question from Howard Gore in 1952. In the proceeding before the commission for the transfer of Gore's authority to Neylon, the commission retained the language of the Gore certificate in issuing a certificate to Neylon although the examiner had recommended that the area to be served should be more clearly and explicitly stated in the Neylon certificate. Nothing further was done to make Neylon's certificated authority more clear until the Interstate Commerce Commission required a clarification by the state commission in connection with an application by Neylon for an interstate certificate. This forced Neylon to apply for a clarification or interpretation of his certificate which precipitated the issues raised in the instant case.

The certificate involved in this litigation was issued on January 24, 1952. The certificate authorized the transportation of commodities generally, except those requiring special equipment. It authorized irregular route operations between Beatrice and vicinity and to and from 10 named cities and their vicinities, and occasionally to and from various points within the state. It is contended by Neylon that the foregoing certificate was

intended to authorize statewide irregular route authority and his application is to so clarify his certificate by spelling out such authorization.

Neylon testified that he purchased Gore's certificate for the purpose of obtaining statewide irregular route authority and that he informed the commission that he so construed the certificate at the hearing on the application to authorize the transfer of Gore's certificate to him. There is no evidence that the commission in any manner acquiesced in such construction. The protesting carriers assert that Neylon's certificate does not authorize statewide irregular route authority, that such authority has not been exercised by Neylon since he acquired the Gore certificate as he claims, and that no need exists for extending Neylon's irregular route authority as the existing service of other carriers is adequate to perform the service.

On January 24, 1952, the commission issued its order in application No. M-8664, supplement No. 6, by which the certificate of public convenience and necessity held by Howard Gore was transferred to Neylon by the issuance of a new certificate to Neylon. The alleged ambiguity in the Neylon certificate relates to the following language pertaining to irregular route operations: "From Beatrice and vicinity, on the one hand, and, on the other hand, to and from Omaha, Lincoln, Fremont, Fairbury, Falls City, Auburn, Nebraska City, Hastings, Grand Island, and Wymore, and vicinities, and occasionally to and from various points within the state of Nebraska at large." The alleged ambiguity arises from the use of the words "to and from various points within the state of Nebraska at large."

It seems clear to us that the certificate designates the points of origin of irregular route operations by the words "From Beatrice and vicinity, on the one hand" and that it designates the terminals of irregular route operations by the words "on the other hand, to and from Omaha, Lincoln, Fremont, Fairbury, Falls City, Auburn,

Nebraska City, Hastings, Grand Island, and Wymore, and vicinities, and occasionally to and from various points within the state of Nebraska at large." So construed, the certificate grants irregular route authority to Neylon in Beatrice and vicinity and occasionally between Beatrice and vicinity and points in the State of Nebraska at large. In re Application of Meyer, 150 Neb. 455, 34 N. W. 2d 904; In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507. The foregoing cases seem to have determined the precise issue contrary to the contentions of the applicant. In the Canada case, the court aptly said that such a provision "obviously was not intended to authorize common carrier operations to and from all locations in the state. If it was, the specifications of definite points of origin and destination therein were meaningless." The decision of the commission is consistent with these holdings and is correct.

The applicant Neylon applies for alternative relief, if clarification is not granted as he requests, by asking that the commission extend his authority to permit statewide irregular route authority to operate between all points in the state.

It is first contended that this issue has been previously decided by the commission. This contention is based on the following circumstances. On November 27, 1953, a motion was filed by Petersen & Petersen, Inc., and others engaged in the operation of motor vehicles for hire in intrastate commerce in Nebraska, to clarify the authority of Neylon under the certificate issued to him in M-8664, supplement No. 6. It is asserted therein that such certificate " 'may possibly be subject to different interpretations, some of which could wrongfully deprive petitioners of a substantial volume of needed traffic and revenue to their grievous and irreparable injury and damage, and therefore it is imperative that an interpretation and determination of the aforesaid certificate be made by the Commission and the operations which may be performed thereunder be specifically set forth

by the Commission in its order of interpretation.' " Objections were filed to the motion by Neylon in which he asked that the motion for interpretation " 'be denied and dismissed; and that the holder of the permit in question be permitted to go without further harassment.' " In overruling the motion for an interpretation, the commission stated: "It has not been the practice of this Commission to interpret one carrier's certificate upon the mere request of another carrier or group of carriers. Requiring a carrier to appear and justify operations performed under his certificate upon the mere request of persons, who, conceive imaginary injuries to themselves, could result in irreparable damage and constant harassment to the certificate holder."

It is evident that the question was not decided on its merits, but was decided on the basis that no actual injury was alleged which authorized the intervention of the commission. The commission was therefore correct in finding that the irregular route portion of Neylon's intrastate certificate is ambiguous and has not been previously interpreted by the commission.

Applicant contends that under these circumstances his present certificate should be extended to authorize the transportation of commodities generally, except those requiring special equipment, by irregular route operations between all points in the State of Nebraska. The burden is on Neylon in order to obtain such an extension of authority to show that the operation is and will be required by the present or future public convenience and necessity. The Greyhound Corp. v. American Buslines, Inc., 178 Neb. 9, 131 N. W. 2d 664; Denver Chicago Transp. Co., Inc. v. Poulson, 172 Neb. 862, 112 N. W. 2d 410.

Some 500 pages of the record are devoted to the determination of the issue of public convenience and necessity. Controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will

be served well by existing carriers; and whether or not it can be served by Neylon in a type of operation without endangering or impairing the operations of existing carriers contrary to the public interest. Denver Chicago Transp. Co., Inc. v. Poulson, *supra.*

There is evidence in this record that little need, if any, exists for the requested extension of service. There is evidence that any public need or demand can be well served by existing carriers. There is also evidence that any substantial attempt to provide the additional service requested will impair or endanger the stability of existing carriers already serving the area under proper authorization. There is evidence to the contrary. Neylon produced witnesses who state that they have a need for the service. Neylon relies upon his past operations and service provided under his erroneously claimed right to serve between all points in the state at large. Ordinarily such operations are not sufficient to establish the necessary public interest. This rule is not without exception, but it has no bearing on the instant case. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

The determination of the public interest in such a case is one that is peculiarly for the determination of the commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the findings of the commission is against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious. Where the evidence is in conflict, as here, the weight of the evidence is for the determination of the commission and not this court.

Under the record in this case, we hold that the order of the commission is not arbitrary or capricious, and that it must therefore be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT LEE KNECHT, APPELLANT.

147 N. W. 2d 167

Filed December 22, 1966. No. 36322.

1. **Criminal Law.** Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.
2. **Criminal Law: Evidence.** A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto.
3. Criminal Law. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed.
4. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.
5. **Criminal Law: Trial.** It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant.
6. Criminal Law: Evidence. Statements of codefendants made after the commission of the crime may be received in evidence in joint prosecutions of a crime committed in concert, regardless of possible prejudice which could result to a nondeclarant defendant from the jury's hearing of these statements and any references therein which incriminated a nondeclarant, where the court has properly instructed the jury as to the restricted application of such evidence, that is, solely to prove the guilt of the declarant.
7. ———: ———. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Richard C. King, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and HASTINGS, District Judge.

BROWER, J.

The defendant and appellant, Robert Lee Knecht, was convicted and sentenced for the crime of burglary by the district court for Douglas County, and has appealed to this court from an order overruling his motion for a new trial.

The case was consolidated in district court for trial with that of two other defendants, Ruth Ann Duncan and Bobby Joe Weiland, but the appeal of Robert Lee Knecht alone is now before us and he will be designated herein as the defendant.

It is first urged that there was not sufficient evidence to submit the State's case to the jury, for which reason the trial court should have sustained defendant's motion for a directed verdict made at the conclusion of the State's evidence, or at any rate, granted a new trial. We will therefore at this point review the evidence as disclosed by the record.

On August 23, 1965, between the hours of 2:30 and 3 a.m., George W. Grixby, employed nights as a window washer, was walking in the vicinity of Sixteenth and Douglas Streets in Omaha, Nebraska. He heard a pounding and about the third or fourth pound heard glass break and a burglar alarm go off. He looked from a distance of about half a block toward the front of the jewelry store operated by the Zales Jewelry Company. There he saw a person run from the store to an automobile parked against the curb. The back of this car was colored orange below and white above. It proceeded south on Sixteenth Street to Farnam Street where, after stopping momentarily, it ran through a red traffic light. He was unable to testify that anyone else was at the scene or in the automobile because he did not observe further

although the area was well lighted. He could not identify any of the three accused. About 10 minutes later a police officer appeared.

Alphonse Powell, a sergeant on the Omaha police force, was operating a cruiser car. Hearing the alarm ringing, he drove to the Zales store, arriving at 3:05 a.m. He noted a large pane of glass was broken with fragments thereof on the walk and within the store. The ring section in the display window near the break was disturbed. The officer met Grixby at the store front and was informed by him of what he had seen. Thereupon the officer stepped to his cruiser and put forth a general broadcast of the robbery and Grixby's information concerning the car.

Carl Ciciulla, a plain clothes police officer, was operating a cruiser car eastward on Vinton Street. He stopped his car on Sixteenth Street for a red light where he noticed an automobile with three occupants making a right-hand turn at Sixteenth and Vinton Streets, and thereafter proceeding west. The car observed was white and faded orange, being an older model Lincoln. Minutes later, at approximately 3 a.m., a "general pickup" came through for a car matching the color of that which he had seen.

At approximately 3:30 to 3:40 a.m., police officer Edward Skar, who had heard the radio bulletin from Zales, observed a white over orange 1956 Lincoln automobile with Iowa plates at Twenty-fourth and Vinton Streets, proceeding eastward on Vinton Street. The officer's cruiser was then going west on the same street. He turned about and attempted to stop it at Twenty-third Street, and succeeded in doing so at Eighteenth and Vinton Streets.

Three persons were in the front seat of the stopped vehicle, including the defendant. The codefendant Ruth Ann Duncan was the driver. Particles of glass were in the car and on the floor was a 4-way tire lug wrench, gloves, and a small black ring holder. A price tag

marked $12.95 was on the front seat. Later a search warrant was procured, and from the glove compartment numerous rings, some in cases, and a watch were taken. Four rings and five ring holders were admitted in evidence and identified by the manager as having been taken from Zales Jewelry Store. Not all the items taken from the store were received in evidence.

The three occupants of the car stopped were identified as the defendant and the two others with whom he was tried. They were placed under arrest and taken to central police headquarters. There is evidence the occupants had been drinking, but none of the officers indicated either the defendant or the other occupants were so intoxicated that they did not realize what was going on or were incoherent. They seem to have promptly followed instructions given them.

Defendant testified on his own behalf that he had started drinking whiskey at his own home about 9 o'clock in the morning before the robbery and continued to drink into the evening. The last thing he remembered was when drinking at the Pussy Cat Bar, having an argument with Ruth Duncan concerning her dancing with another man. The next thing he recalled was waking up in jail.

Defendant's contention that there is not sufficient evidence to submit the State's case to the jury is based to a great extent on the testimony of Grixby that he saw only one man at the scene of the crime. He did not, however, say there was none other there, but only that he did not observe any other. The cross-examination by defendant's counsel on this point follows: "Q. But you only saw one person out of the car? A. I only saw one person out of the car. Q. In fact, you only saw one person; is that correct? A. That's right, just one person is all I saw. Q. You didn't see another soul in the car? A. No; I didn't look that far. I mean, I just didn't observe it. All I could see was just the one person. Q. That's right, you just saw one person, and that might have been all there was there, as far as you know? A. That's

right. Q. And this is a very well-lighted area there? A. It is in front of the jewelry store." Grixby had testified he observed the color of the car from its back which was all he saw.

We here cite certain rules applicable to the present case.

"Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." § 28-201, R. R. S. 1943.

In Miller v. State, 173 Neb. 268, 113 N. W. 2d 118, this court said: "A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto. * * * Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed."

"The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong." Small v. State, 165 Neb. 381, 85 N. W. 2d 712, 70 A. L. R. 2d 984.

"It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant." Salyers v. State, 159 Neb. 235, 66 N. W. 2d 576.

Jewelry stolen from the display window at Zales Jewelry Store was found in the car in which the defendant rode. Broken glass was seen in it. The defendant, when apprehended, was with the same person in whose presence he had been drinking beforehand. An officer testified he saw three persons in a similar vehicle on Vinton Street at 3:05 a.m. There is evidence a similar vehicle was stopped and the defendant with two companions apprehended therein a few minutes thereafter. The brief period between the burglary and the arrests

is quite significant. There is evidence from which the jury might have inferred he was present at the burglary and participated in it. We conclude that the evidence disclosed by the record is sufficient to support a verdict of guilty and the defendant's contentions to the contrary are without merit.

Defendant maintains the trial court erred in allowing the confession of Ruth Ann Duncan, a codefendant, to be admitted in evidence without proper instructions as to its use and without setting forth that it was not applicable to the defendant Knecht. Defendant also objects to instruction No. 13 which relates to the requirements concerning the admission and use of the confession. The defendant does not argue in his brief that the confession was not properly obtained from Mrs. Duncan, nor that the foundation made to the court alone or to the jury was insufficient or improper. His contention is that although it might have been admissible against she who made the confession, it was erroneously and prejudicially received against the defendant herein. In the present case, the defendant and his codefendants were tried jointly as authorized by statute, section 29-2002, R. R. S. 1943. The confession was relevant and material to the issue presented as to the codefendant Ruth Ann Duncan.

There is a recent extensive annotation beginning at 4 A. L. R. 3d 671, with respect to admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence. The initial statement, with respect to the annotation's scope, states: "The term 'conspiracy' is employed in a broad sense herein to cover not only the technical offense of conspiracy itself, but also the commission of a particular substantive crime in concert, the scope of the annotation thus extending to trials for conspiracy alone, conspiracy and a substantive crime charged in separate counts, and trials for a substantive crime alone where it was committed in concert." At page 678 of the annotation, it is stated:

"Authorities have agreed that as a general rule, subject to certain exceptions, incriminating, inculpatory, extrajudicial declarations of a coconspirator made in the absence of or without the knowledge of the accused, after the conspiracy has come to an end through withdrawal or arrest of the participants, or termination of the plan in success or failure, are inadmissible in evidence in a criminal trial to prove the guilt of one other than the declarant." The multitude of cases there cited include Zediker v. State, 114 Neb. 292, 207 N. W. 168, where the rule was applied by this court. Other cases are cited throughout the note where convictions have been set aside because statements or confessions of another participant to the crime were admitted in evidence. These often relate to the trial of a single defendant who did not make the statement. Those of the annotated cases involving joint trials where a reversal took place are generally those where the trial court did not make clear that the statements or confessions could not be considered by the jury against anyone but the one who made it. On page 714, it is stated: "It has been held or recognized in a large number of cases that postconspiracy statements of coconspirators may be received in evidence in joint prosecutions of conspirators, regardless of possible prejudice which could, and in some cases did, result to a nondeclarant defendant from the jury's hearing of these statements and any references therein which incriminated a nondeclarant, where the court has properly instructed the jury as to the restricted application of such evidence, that is, solely to prove the guilt of the declarant." A large number of cases are cited under this statement. We think this rule should be and is adopted by this court and applied here to the joint trial of a crime committed in concert as indicated in the definition of the scope of the annotation.

In State v. Hall, 176 Neb. 295, 125 N. W. 2d 918, this court considered both the question of whether consolidation might be ordered where a confession of a codefend-

ant was involved and the admissibility of such a confession at a joint trial. There the consolidation was permitted and with respect to the admission of the confession the court stated: "In the instant case the trial court gave long-approved cautionary instructions to consider any statement or confession only as to the defendant making it." It is apparent this court was then applying the rule to the annotation. No error is urged here with respect to the consolidation. In the case before us, instruction No. 13 limits the consideration of "any such statement or admission so made solely in the case of the defendant making the same." Instruction No. 13 appears to be proper under the general rule hitherto stated. Although it is long, its length was required in order to set forth the various requirements which the jury must find existed before a confession could be considered. Defendant seems to argue that the instructions should either have made the confession applicable only to Ruth Ann Duncan by name, or inapplicable to defendant by name. We do not think this was necessary. It did clearly restrict the consideration of the confession to the codefendants making it and we deem it sufficient for that purpose. Instruction No. 13 further provided: "Though the defendants are tried together, it is your duty to separately consider the guilt of each defendant. Evidence relating to one defendant may not be considered against any other defendant. A finding of guilt against any defendant, if such you should find, shall in no manner be considered in your determination as to any other defendant. You will not permit any defendant to be prejudiced by reason of the fact that the defendants are tried together." The two instructions correctly set forth the law applicable. The contention of the defendant cannot be sustained.

Defendant maintains the trial court erred in not granting his motion for a mistrial when evidence of other crimes were brought into the case. The first incident complained of was on the direct examination of officer

Edward Skar who was being questioned concerning articles taken from the car in which the defendants were riding when stopped by him. The testimony follows: "Q. Now, what you recovered from the vehicle, is this what you have been talking about, the gloves, the lug wrench and the - I count one, two, three, four, five ring holders and four rings; is that all the property that was taken from the car? A. No, sir. Q. Were there other items? A. Other rings, yes, sir, and one Bulova watch. Q. Do you know why those rings and the Bulova watch aren't here? A. From personal knowledge, no, but they were turned over to the Council Bluffs Pottawattamie County authorities." Thereupon the defendant's counsel, out of the presence of the jury, moved for a mistrial, stating this testimony, that the articles had been turned over to the Iowa authorities, indicated they were subjects of other crimes, and the defendants and each of them were therefore entitled to a mistrial. He did not ask the answer be stricken. There was no direct evidence of another crime but only an inference thereof as stated by defendant's counsel. The defendant cites cases holding that a mistrial should be granted where evidence of other crimes is brought into the record. It is not necessary to discuss these cases here. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Rand, 238 Iowa 250, 25 N. W. 2d 800, 170 A. L. R. 289, and cases cited in the annotation following 170 A. L. R. 306. See, also, Peery v. State, 165 Neb. 752, 87 N. W. 2d 378, where the same rationale was followed. Clearly there was no error in refusing a mistrial under circumstances where the articles taken from the car were a part of the State's case and the prosecution felt it necessary to account for the absence of some of those articles testified to by others.

The second incident which the defendant claims points to the commission of other crimes relates to the testimony of Maurice P. Barrett, a police officer who was asked questions in reference to whether an attempt was made to obtain a statement from Bobby Joe Weiland, the other codefendant. In that examination, the following transpired: "Q. Did you advise him of his right to counsel? A. I did. I also advised him I was going to get a statement from Ruth Ann Duncan implicating him in the Zales Jewelry. Q. What was his reply? A. He said he didn't want to talk about it; he was out on a bond at that time and he didn't want to discuss anything. MR. KING: (Out of hearing of jury) Comes now counsel for defense and moves the court at this time for a mistrial for the reason that the officer now testifying before this court has indicated that a conversation with one Bobby Joe Weiland was, in substance, that he wasn't going to talk to him because he was already out on bond, and the implication of being already out on bond would tend to connect the defendant, Bobby Joe Weiland, with another crime, and would tend to prejudice the jury against the defendant herein, and moves for a mistrial specifically in favor of Bobby Joe Weiland. THE COURT: (Out of hearing of jury) Motion is overruled." The inference of the commission of another crime which defendant's counsel implied was apparent was chargeable only to the codefendant Weiland and not to the defendant appealing here. The motion for mistrial seems to have been made particularly on behalf of the codefendant. We fail to see how this evidence prejudiced the defendant appealing here. The contention is without merit.

We cannot sustain the defendant's assignments of error and it follows that the judgment and sentence of the trial court are affirmed.

AFFIRMED.

WHITE, C. J., concurring.

I concur in the opinion of the court herein. The State

made a motion in the trial court for a consolidation of the cases which were thereafter tried together. The defendant then had counsel of his own choosing who continued to act thereafter throughout the trial in district court and on appeal here. No objection was made to the consolidation at that time and no motion for severance or issue with respect thereto was made in the trial court thereafter. Defendant made no objection to the offer of the confession in evidence in the trial court. Defendant's brief in this court assigns no error and presents no argument with respect to the consolidation. No error is assigned to the admission of the confession except as relates to the instructions to the jury with respect thereto which is discussed in the court's opinion. Under such circumstances the defendant should not be permitted to assert his own failure as a basis for a new trial. A defendant will not be permitted to sit by with indifference to any rights he may assert and take his chances on a favorable verdict and when it is adverse to raise such claimed errors to obtain a second chance at a verdict more favorable to him.

A synopsis of the evidence is contained in the opinion of the court. I think it was sufficient to submit the issue of the defendant's guilt to the jury.

BOSLAUGH, SMITH, and MCCOWN, JJ., dissenting.

The conviction in this case rests upon evidence that the defendant was apprehended while riding in an automobile operated by Ruth Ann Duncan; the automobile had been used in the commission of a burglary a short time before; and the defendant had been in the company of Ruth Ann Duncan earlier that day. There is no other evidence to identify the defendant with the crime.

The case is complicated by the fact that the defendant and Ruth Ann Duncan were tried jointly, and her confession, which implicated the defendant, was received in evidence. Unlike the defendant in State v. Hall, 176 Neb. 295, 125 N. W. 2d 918, the defendant in this case testified that he had no knowledge of the burglary and

he has never confessed or admitted implication in the crime.

Although the defendant did not object to the admission of the Duncan confession as against him at the time it was offered and did not move for a severance or a mistrial on that ground, because of the particular circumstances in this case we are unable to say that the defendant received a fair trial. We believe the judgment should be reversed and the cause remanded for a new trial.

STATE OF NEBRASKA, APPELLEE, V. CHARLES F. BUNDY, APPELLANT.

147 N. W. 2d 500

Filed December 22, 1966. No. 36354.

1. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case in which the evidence presents an issue of fact as to the guilt or innocence of the accused and the conclusion of the jury may not be disturbed by this court unless it is clearly wrong.
2. **Criminal Law: Trial.** This court in a criminal action will not interfere with a verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
3. **Criminal Law: Juries.** It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
4. **Constitutional Law: Criminal Law.** The guidelines laid down in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, are available only to persons whose trials had begun on or after June 13, 1966, and the rules in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, apply to all cases tried after June 22, 1964.

5. ———: ———. At a trial occurring prior to June 13, 1966, it is not error to admit into evidence statements made by an accused during custodial interrogation by the police where the voluntariness thereof is not challenged and there is no evidence that prior to the statements the defendant had requested and been denied an opportunity to consult with counsel.
6. **Criminal Law: Evidence.** No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of improper admission or rejection of evidence, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.
7. ———: ———. Section 29-2222, R. R. S. 1943, does not confine the proof on the issue of defendant being a habitual criminal wholly to the documents therein mentioned.
8. ———: ———. Where counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and for that reason not admissible.
9. **Evidence.** In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented we will presume the common law or statutes of such other jurisdiction to be the same as ours.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

William L. Walker, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

BROWER, J.

An information containing two counts was filed against the defendant, Charles F. Bundy, in the district court for Lancaster County. The first count accused him of willfully, maliciously, and forcibly breaking and entering a dwelling house on January 9, 1966, with intent to steal property of value. The second count accused him of being a habitual criminal. A trial to the jury in dis-

trict court resulted on March 8, 1966, in a verdict of guilty on the first count, and at a subsequent trial to the court, he was found to be a habitual criminal and judgment was entered sentencing him to 10 years in the Nebraska Penal and Correctional Complex. He has brought the case here by an appeal.

Such of the assigned errors as are necessary to our decision will be stated as they are discussed.

Defendant contends the verdict and judgment of guilty on the first count was contrary to law and not supported by the evidence, and the trial court erred in overruling his motion to set aside and vacate the verdict for that reason. It is, consequently, necessary to review the evidence which we consider pertinent and controlling.

The testimony shows Henry Schmidt and Katherine Schmidt, husband and wife, occupied the dwelling at 946 North Eighth Street in Lincoln, Nebraska. Henry Schmidt was working as a city fireman at the fire station on Sunday, January 9, 1966. At 10 a.m., Robert D. Goodman, her son-in-law, drove to the Schmidts' home and got Katherine Schmidt and took her to spend the day at her daughter's place. Before leaving, she made sure that all the doors were locked. Goodman brought Mrs. Schmidt back to her home in his automobile at 7:15 p.m. that evening. Their car approached the home in an alley from the east. They noticed a Ford panel truck parked in the alley behind the house. Leroy Cole, who was then standing across the street, crossed over and conversed with Goodman until two policemen came in a cruiser car, arriving at 7:20 p.m. One officer talked with Cole while the other went into the house and observed the broken glass and displaced articles later mentioned.

On entering her home, Mrs. Schmidt discovered several guns lying on the kitchen floor which were previously kept in the gun rack in the bedroom. Glass was broken in the back door and both doors were ajar. A television set was removed from its stand and a record player and several records which were kept elsewhere

were all placed on the bed. The little change of their son who was absent was dumped out of the container with two "little expensive" wristwatches. A large screwdriver, found on a dresser, did not belong to Mr. Schmidt and had not been there when she left. Mrs. Schmidt called the police.

Leroy Cole testified for the State. He stated he drove the defendant, between 11 a.m. and 11:30 a.m. on January 9, 1966, to his home at 2322 T Street in Lincoln, Nebraska, where the defendant was invited to have dinner. About 7 p.m., Cole and the defendant decided to visit Cole's son confined in the hospital. The two thereupon left the Cole home in a 1956 Ford panel truck owned by Cole's father-in-law and driven by Cole. On the way to the hospital the defendant said he wanted to drive past the home of one Neiderhouse at Eighth and Y Streets. They drove by it and, in starting to leave, turned a corner and went through an alleyway where Cole stopped the car at the defendant's request. Defendant got out and went to the house and Cole got out to go to the toilet. While in the alley Cole heard glass break. Thereafter he went to the house, found the glass broken and the door open. Going inside, he called to the defendant who replied that he was in the house. Defendant requested Cole to take some of the articles to the car. Cole went outside, saw car lights, and knew someone was coming. He went back into the house rather than leave the defendant "stranded like that." Cole panicked because of the lights, and ran out the front door, crossed the street, and went behind a neighboring house where defendant met him. Cole told the defendant he would have to return to get his father-in-law's car so the latter would not become implicated. Defendant told Cole to meet him on a street by the interstate access route. Cole recrossed the street to the Schmidt premises where, after conversing with Goodman and the officers, he was arrested and taken to the police station. He was serving time in the Nebraska Penal and

Correctional Complex on matter involving the same incident.

Mrs. Leroy Cole testified that in the evening she was in the front room of their home on the first floor near the door watching television when defendant and Leroy Cole left the house "a little bit before 7:00 (p.m.)." She never saw the defendant again until 30 or 40 minutes later when he again entered the door and, without speaking, went directly to the basement recreation room where there were three other men who had been drinking beer and viewing television during the day. About 5 minutes thereafter she answered a phone call which came from the police. Going to the basement she asked the defendant about her husband and he said, " 'Well, maybe he went for a ride by himself.' " The other men in the recreation room then went upstairs, and the defendant told Mrs. Cole "that if we wouldn't say anything and just go along sort of, something to that nature, that everybody would get out of it all right." Defendant then went upstairs to a bedroom in which there was a baby of another lady staying at the home.

Defendant testified on his own behalf. He stated that at 6:50 p.m. on the day in question, Cole asked him to go to the hospital to see Cole's son. Defendant responded, " 'I don't know; I don't think so. We'll see.' " The two men went outside and argued as to defendant going. After 5 or 10 minutes it was decided Cole should go alone. Defendant returned to the house but entered by the back door. He started to go downstairs where the men were but changed his mind and went to the bedroom to play with the baby. About 10 or 20 minutes later he heard a car and went to the living room where Mrs. Cole asked, " 'Are you and Leroy back?' " He answered he had been nowhere and then went downstairs where the men were. Mrs. Cole came down and asked about her husband and said the police had him. Defendant said he did not know what she was talking about. When Mrs. Cole stated the police were coming, he said,

" 'Well, let them come.' " The baby was crying so he went back to the bedroom.

A taxi driver testified on rebuttal that on January 9, 1966, at 7:45 p.m., he picked up a man at the Cloverleaf Motel and delivered him to 2322 T Street, the address of the Cole home. The addresses and time are on the driver's trip ticket introduced in evidence. The driver testified the defendant was his passenger on that trip. He testified the passenger had a screwdriver but denied that it was one in evidence found in the Schmidt home.

Captain Lowell Sellmeyer of the police force on rebuttal also testified the defendant told him at the police station the morning after his arrest that he had been at the house at 2322 T Street until shortly before 7 p.m. that evening. He had gone with Leroy Cole outside to his car. They sat there for 10 or 15 minutes and then he had refused to go to the hospital with Cole. The defendant stated to him that, getting out of the car, he had walked to the Cole house and was admitted by Mrs. Cole, and that he went directly to the basement where the men were and remained until the police came. The officer testified the Cloverleaf Motel was approximately 5 blocks from the Schmidt home and there was an outdoor pay telephone a block from the motel at 1216 North Tenth Street.

The stories related in the testimony of Leroy Cole and the defendant are in direct conflict. There was evidence, if believed, tending to substantiate Cole's testimony. In Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340, this court stated: "It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.

"This court in a criminal action will not interfere with a verdict of guilty based upon conflictng evidence,

unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

"The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case in which the evidence presents an issue of fact as to the guilt or innocence of the accused and the conclusion of the jury may not be disturbed by this court unless it is clearly wrong."

In this case we cannot say the evidence was insufficient as a matter of law to support a finding of guilt beyond a reasonable doubt. There was ample evidence, if given credence, that the defendant broke and entered the dwelling and was preparing to remove property therefrom. This was sufficient to support the verdict. The contention of the defendant has no merit.

The defendant assigns error to the giving of instructions Nos. 6, 9, 10, and 11, but in the argument in his brief, although they are all set out at length, he fails to point out wherein any or all of them did not state the law properly. We find no error in them either. Defendant merely asserts the evidence was insufficent to sustain the verdict under the instructions given. That question has already been decided adversely to his contentions.

Defendant maintains the trial court erred in failing to find his constitutional rights were violated when he was interrogated by captain Sellmeyer subsequent to his arrest. He contends the interrogation violates the rules laid down by the Supreme Court of the United States in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. In Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882, it was held the guidelines laid down in Miranda v. Arizona, *supra*, are available only to persons whose trials had begun on or after June 13, 1966, and that rules in Escobedo applied to all cases tried after June 22, 1964.

We need not consider Miranda, but should consider the case before us in the light of Escobedo. In Escobedo v. Illinois, *supra,* the Supreme Court of the United States held: "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U. S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." In Johnson v. New Jersey, *supra,* the court plainly stated this was the essence of Escobedo. In the present case, captain Sellmeyer's testimony was given on direct examination without any objection whatever. Neither was he asked any questions by defendant's counsel either on voir dire or cross-examination concerning the interrogation or the foundation with respect to this testimony. It was not shown that defendant asked for or was denied an attorney. Neither does it appear that he was not informed of his right to remain silent. No questions were asked concerning such warning. At a trial occurring prior to June 13, 1966, it is not error to admit into evidence statements made by an accused during custodial interrogation by the police where the voluntariness thereof is not challenged and there is no evidence that prior to the statements the defendant had requested and been denied an opportunity to consult with counsel. See State v. Worley, 178 Neb. 232, 132 N. W. 2d 764. The error assigned by the defendant cannot be sustained.

Error is assigned to the trial court in overruling objections of defendant's counsel to questions directed by the prosecution to officer Kenneth Wade with respect to the fair market value of the personal property allegedly attempted to be taken from the Schmidt dwelling. The items referred to were those hitherto mentioned as having been removed from their usual resting place. Wade had entered the home and viewed this property and so testified. He said he had seen such items before and knew their price. There was no foundation laid to show Wade was an expert. Over objections that the questions were incompetent, irrelevant, and immaterial, and that no proper or sufficient foundation was laid, the witness testified that the five guns were worth $200, the television set $60, and the record player $15. It is unnecessary to consider the sufficiency of the foundation. The questions asked and answers given were immaterial and irrelevant. Section 28-532, R. R. S. 1943, defining the crime of burglary, only requires that the breaking and entering be with "intent to steal property of any value." In Schultz v. State, 88 Neb. 613, 130 N. W. 105, 34 L. R. A. N. S. 243, this court said: "No witness testified that the property in the mill was of any value, nor does the proof show there was any personal property therein save the safe and its contents and an office desk. The owner testified that nothing other than some papers was missing and they were subsequently found in a barrel near the mill. These documents were of sufficient importance to impel him to search for them. The jury would be justified in finding that the documents were of some value." Here the five guns, television set, and record player were property of a nature that a jury could and naturally would infer to be of value and no further proof was necessary. Section 29-2308, R. R. S. 1943, however, in part provides: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of * * * the improper admission or rejection of evidence, * * * if the Supreme

Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." We fail to see that the valuations placed upon the property by the witness prejudiced the defendant. The nature of the property involved was such that any jury with common knowledge of the affairs of the world would infer it had not only some, but substantial value. Whether it was $25, $50, or $200 was immaterial, but we fail to see how the value assigned by the witness was prejudicial to the defendant. The error was harmless to the defendant's rights and the assignment cannot be sustained.

The defendant further maintains the trial court erred in finding and ordering that the defendant was a habitual criminal and punishing him as such. Defendant seems to base his contentions on section 29-2222, R. R. S. 1943, which reads as follows: "At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment." Defendant argues this statute, in providing that a duly authenticated copy of the former judgment and commitment shall be competent and prima facie evidence of such former judgment and commitment, is a limitation on the method of proving such prior conviction and commitment. He claims the cited section points out the only acceptable method of proof and that method is exclusive. We think not. The purpose of the statute is to give competency and weight to the particular evidence mentioned. The fact that the statute states it is prima facie evidence of such former judgment and commitment is itself suggestive that other proof may be received also. We conclude that section 29-2222, R. R. S. 1943, does not confine the proof on the issue of defend-

ant being a habitual criminal wholly to the documents therein mentioned.

In the case before us, considerable evidence was introduced bearing on the defendant's previous convictions, sentences, and commitments. Exhibit 5 is a copy of the information and docket entries in the office of the clerk of the circuit court of Hancock County, Illinois. The docket shows Charles Bundy was found guilty of the crime of forgery on March 24, 1959, and sentenced to the Illinois State Penitentiary System on April 15, 1959, "for a period of one to fourteen years and more specifically a mimimum of three years and a maximum of five years unless sooner discharged by due process of law." Exhibit 3 was a certified copy of the conviction and sentence of defendant for the period of 2 years to the Nebraska Penal and Correctional Complex in the district court for Lincoln County, Nebraska, for the crime of breaking and entering with intent to steal property of value on April 29, 1964. Exhibit 4 was the original commitment to the Nebraska Penal and Correctional Complex on the conviction in Lincoln County. Exhibits 5, 4, and 3 were admitted in evidence. Exhibit 5 seems to be authenticated under the act of Congress. The defendant seems to maintain even if other proof, aside from the particular documents mentioned in section 29-2222, R. R. S. 1943, might be considered on the issue of defendant being a habitual criminal, the admissibility of the documents in evidence also depends upon their being authenticated, which he seems to claim should in all cases be as required of judgments from foreign states under the act of Congress. This is not necessary for us to determine. It is sufficient to say they are in evidence, and that not only was no objection made to their being received, but at the trial the defendant's counsel specifically stated he had no such objection. Where counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they

were improperly certified or authenticated and for that reason not admissible.

The defendant did object to the reception of exhibit 6 in evidence because it was not properly authenticated. It purports to be a mittimus issued to the "warden or keeper" of the Illinois Penitentiary System. It is certified to only by the record clerk of the Illinois State Penitentiary at Joliet, Illinois. The objection to its introduction was sustained. Defendant therefore argues that there is no evidence that he was actually committed in Illinois and hence no evidence that he was a habitual criminal under sections 29-2221 and 29-2222, R. R. S. 1943. We think it is unnecessary to review the other evidence, consisting of admissions made to a police officer, testified to without objections, and testimony of the officer in charge of records in the Nebraska Penal and Correctional Complex, and records introduced from said complex tending to show the defendant was confined more than 3 years in the state penitentiary in Illinois and more than 1 year in the Nebraska Penal and Correctional Complex on the previous charges mentioned.

Exhibit 5, showing the conviction and sentence in Hancock County, Illinois, and exhibit 3, showing the conviction and sentence in Lincoln County, Nebraska, are both in evidence and it is shown the defendant was the same person in the two cases. In Rains v. State, 142 Neb. 284, 5 N. W. 2d 887, this court in its opinion stated: "Defendant urges that proof of commitment, as required by the habitual criminal law, was lacking. We think not. Another statute, section 29-2401, Comp. St. 1929 (now section 29-2401, R. R. S. 1943), provides that within 30 days after sentence, unless execution thereof be suspended, the convicted person shall be delivered to the warden of the penitentiary, together with a copy of the sentence of the court, there to be kept until the sentence is served or a pardon granted. If sentence is suspended and the conviction subsequently affirmed, the same procedure is prescribed. It must necessarily

be presumed in the absence of any evidence to the contrary that the directions of the statute were carried out by the public officers involved. We think the proof offered is in all respects sufficient to sustain the finding of prior convictions within the meaning of section 29-2217, Comp. St. Supp. 1939 (now section 29-2221, R. R. S. 1943)." The Illinois statutes on this point are not shown, but: "In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented we will presume the common law or statutes of such other jurisdiction to be the same as ours." Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431. The defendant's contention that the trial court erred in finding him a habitual criminal and sentencing him as such has no merit.

We cannot sustain the defendant's contentions with respect to any of the errors urged by him. It follows that the judgment and sentence of the trial court with respect to both counts of the information be and the same are affirmed.

AFFIRMED.

ORAL LANE, APPELLANT, V. OGALLALA LIVESTOCK COMMISSION COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

147 N. W. 2d 518

Filed December 29, 1966. No. 36297.

Contracts. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract.

Appeal from the district court for Keith County: JOHN H. KUNS, Judge. Affirmed as modified.

McGinley, Lane, Mueller & Shanahan, for appellant.

Firmin Q. Feltz, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and C. THOMAS WHITE, District Judge.

BOSLAUGH, J.

This case involves conflicting claims to the proceeds from the sale of livestock which were produced and sold pursuant to an agreement between the plaintiff, Oral Lane, and Harold Swan. The defendants are the Ogallala Livestock Commission Company and The First National Bank in Ogallala, Nebraska. The bank claims a right to the proceeds under chattel mortgages executed by Swan. The Ogallala Livestock Commission Company disclaims any interest in the proceeds.

The plaintiff is the owner and lessee of land in Arthur County, Nebraska. Prior to 1962, the plaintiff employed Swan on a monthly basis to look after a herd of cattle which the plaintiff maintained upon the land.

In 1962, the plaintiff and Swan entered into an agreement whereby Swan was to be compensated by sharing in the proceeds from the sale of cattle produced on the plaintiff's land. In March 1963, this agreement was reduced to writing and is identified in the record as exhibit 1. The agreement provided, generally, that the plaintiff would furnish the land and the cattle and that Swan would furnish the necessary labor and pay $3,500 to the plaintiff as rent for the use of the premises. Each party was to pay one-half of the expense of feed, salt, minerals, cake, drugs, medicines, and veterinary service. There were specific provisions as to fences, equipment, gasoline, propane, machinery repairs, well and tank maintenance, taxes, and losses of livestock.

Swan was to be compensated by receiving three-fifths of the net proceeds realized from the sale of the " '1962' " calves. Advances for cake, feed, and "other expenses or costs of operation" were to be charged against the interest of the party who received the advance.

After the 1962 calves had been sold, Swan took the

check from the commission company, which was payable to the plaintiff, into the bank, and an employee of the bank helped Swan make out a settlement sheet. In this settlement, the rent due the plaintiff together with the amount due the plaintiff for "cake, etc." were deducted and the plaintiff paid Swan the net amount due him.

In the fall of 1963, the plaintiff and Swan entered into an extension agreement which extended the original agreement to October 1, 1964.

After the 1963 calves had been sold, Swan again took the check into the bank to have a settlement sheet prepared. Swan testified that "trouble" developed then because there wasn't enough money to go around. The bank had its name put on the check which was sent to the plaintiff. The plaintiff refused to endorse the check and this action followed.

The controversy concerns the payment of the $3,500 rent due the plaintiff. The plaintiff contends that the rent is payable from the proceeds of the sale of the livestock. The bank claims, in effect, that the rent was a separate item of indebtedness between the plaintiff and Swan; that in the absence of a provision specifying when it was due and payable, it was not due until the expiration of the term; and that it should not be deducted from Swan's share of the proceeds from the sale of the livestock.

The case turns on the construction of the agreement between the plaintiff and Swan. As we view the record, Swan's right under the agreement was to receive three-fifths of the net proceeds from the sale of the cattle as compensation for his services under the contract. Since the plaintiff furnished both the land and the cattle, the rent due the plaintiff was a device to equalize the contributions of the parties to the agreement. It was an "expense or cost of operation" which was properly "charged against the interest to be received" by Swan. The use of the land was an "advance" by the plaintiff

although it did not involve an expenditure of funds by him.

The evidence shows that this was Swan's understanding and interpretation of the agreement. The settlement made after the sale of the 1962 calves confirms this understanding. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448; Weiss v. Weiss, 179 Neb. 714, 140 N. W. 2d 15.

The rights of the bank in this case are entirely derivative. The bank could not obtain from Swan any greater interest under the contract than he possessed. The rent was chargeable against the interest to be received by Swan from the proceeds of the sale of the livestock.

It is unnecessary to consider the plaintiff's contention in regard to the validity of the bank's mortgages or the bank's contentions in regard to an agister's lien.

The judgment of the district court, which directed the payment of $3,500 to The First National Bank in Ogallala, Nebraska, from the sum then in the registry of the court, is modified to provide that the payment shall be to the plaintiff. The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

McCOWN, J., dissenting.

The action here is not a suit for an accounting between the parties to a contract, but rather a determination of priority as to a specific fund between two creditors of the same debtor. It involves a chattel mortgage on specifically described cattle and the rights of the mortgagee under that mortgage. Swan's ownership or mortgageable interest in the cattle or the fund involved, while determined from the terms of the contract, is separate and distinct from his interest in the contract. The bank's chattel mortgage was made on the strength of the written contract, but the bank was not a party to the contract. The 1963 settlement between the plaintiff and

Swan is relied upon as establishing the intent of the parties to the contract. There is no showing in the record as to when the settlement was had with reference to the termination of the contract year, nor when the sale of the prior year's calves was made. The only matter involved of record in 1963 was an accounting, and there was no issue at the time of the settlement over either the rent money or a chattel mortgage interest.

The basic question here is whether, under the terms of the contract, Swan had a mortgageable interest in the specific livestock or the proceeds of their sale, and, if so, what that interest was at the time the bank's chattel mortgage lien attached. The trial court determined the case on that basis and I, therefore, cannot concur in the majority opinion.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY F. PITZEL, APPELLANT.

147 N. W. 2d 524

Filed December 29, 1966. No. 36310.

1. **Criminal Law.** If a plea of guilty has been received by the court without observance of the precautions and solemnities required by law, the court should permit the plea to be withdrawn.
2. **Parent and Child: Criminal Law.** Abandonment is an actual, willful desertion, followed by the willful neglect or refusal to contribute to the support of the wife.
3. ———: ———. Where an order of the court imposes restraint on a parent to the extent that such parent is restrained from coming on to the premises of the other or on the premises of any issue of said parents there is no illegal abandonment while such order is in effect.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions.

Ralph R. Bremers, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MANASIL, District Judge.

MANASIL, District Judge.

This is a criminal case wherein the defendant is charged with a felony as a result of an information having been filed against him by the State of Nebraska charging substantially that he is guilty of the crime of abandonment of wife and children in that on or about the 17th day of May 1965, Anthony F. Pitzel did without good cause, abandon his wife and willfully neglect or refuse to maintain or provide for her, and did abandon his children under the age of 16 years.

The district court entered an order to the effect that defendant, being indigent, be represented by M. McCormack, public defender. Defendant was arraigned, pleaded guilty, and was adjudged by the court to be guilty as charged. Sentence was deferred.

Subsequently on the 16th day of December 1965, the court entered an order to the effect that defendant appeared with counsel, Ralph H. Bremers, for hearing, and that he moved for leave to withdraw his former plea of guilty; evidence was adduced on behalf of defendant; argument was made by said counsel; and a finding made by the court that the evidence adduced by defendant was not sufficient to overcome the findings by the court therein at the time of arraignment, nor of any sufficient probative value, nor sufficient to require the court, in its discretion, to grant the motion. The motion was denied.

Afterwards on the 21st day of December 1965, a judgment and sentence was rendered and entered against defendant who was present before the court, after a motion was made by his counsel ore tenus for leave to withdraw his former plea. The motion was denied.

The information was laid under section 28-446, R. R. S.

1943, which provides in part: "Whoever, without good cause, abandons his wife and willfully neglects or refuses to maintain or provide for her, or whoever abandons his * * * children * * * and willfully neglects or refuses to provide for such * * * children * * * shall, upon conviction thereof, be deemed guilty of desertion."

The State charged that the offense had been committed May 17, 1965. From November 28, 1962, to January 20, 1966, a suit by defendant's wife for divorce from bed and board was pending in Douglas County. On November 28, 1962, defendant's wife obtained this restraining order: "IT IS * * * ORDERED that pending this action the defendant * * * be and is hereby restrained from coming upon the premises * * * or upon any premises hereafter occupied by the plaintiff alone or with others or occupied by any issue born of this union, and from in any manner imposing any restraint upon the personal liberty of plaintiff directly or indirectly or by telephone."

On December 5, 1962, the court ordered temporary allowances and found that the restraining order should continue until further order. No dissolution appears, and a stipulation recites that the restraining order "is still pending."

The material elements of the offense are abandonment and neglect to support and both without good cause. Colling v. State, 116 Neb. 308, 217 N. W. 87; Cuthbertson v. State, 72 Neb. 727, 101 N. W. 1031; Altis v. State, 107 Neb. 540, 186 N. W. 524. The statute does not provide a continuing offense. State v. Hoon, 78 Neb. 618, 111 N. W. 462.

Our definition of abandonment has varied. Graham v. State, 90 Neb. 658, 134 N. W. 249, approved the following instruction: "'Abandonment * * * is an actual, wilful desertion, followed by a wilful neglect or refusal to contribute to the support of the wife, * * *.'"

Colling v. State, *supra*, states: "* * * the abandonment occurred at the same time as the abandonment of the

wife, but a different rule would obtain as to the child. Departing from the home where the child was would not necessarily be an abandonment of the child. * * * The mere failure to support the child would not constitute the offense and start the statute of limitations to running."

State v. Hoon, *supra,* states: "* * * the abandonment in this case occurred in 1900, three years * * * before any criminality could attach to the act. * * * the second element * * * the failure to support—did not take place until 1904. But the question arises: Can one be convicted of a felony by showing an act committed by him, innocent when done, but by a later statute made an essential element of the crime charged against him? * * * It is suggested that the offense defined is a continuing one, and, although the abandonment may have occurred long prior to the enactment of the statute, still, if the crime was completed by a failure to support after the statute went into effect, the claim made by the defendant that it is an ex post facto law cannot be maintained. * * * The same question under a similar statute was before the supreme court of Georgia, and it was there held: 'If, after a completed act of desertion, a father has been convicted * * *, there can be no new act of abandonment until a return to the discharge of the parental obligation, and no new offense of abandonment until such a return, followed by another act of desertion, and this although the original abandonment is wilfully and voluntarily continued and the child remains dependent and destitute.' Gay v. State, 70 Am. St. Rep. 68 (105 Ga. 599). The case is a well-reasoned one, and the holding appeals to our mind as a correct construction of the law."

In People v. Duston, 173 Mich. 368, 138 N. W. 1047, 42 L. R. A. N. S. 1065, it is said: "'Abandonment' is * * * 'the act of a husband * * * who leaves his * * * consort wilfully, and with intention of causing perpetual separation.' * * * In the case at bar, respondent has

already been separated from his wife and children by the decree of a court. He was a thing apart from them. He had no right to, and could not if he wished, resume marital or family relations with them. * * * to constitute the offense, desertion, abandonment, and refusal or neglect must contemporaneously combine; * * *."

In Annotation, 73 A. L. R. 2d 975, it is said: "The majority view is that a father cannot commit the offense of abandonment or desertion of a child after the entry of a divorce decree which awards the custody of the child to the mother where the mother has actual possession of the child at and after the entry of the order for custody. In such a case the child lives with the mother, but the father is not entitled to live with the mother and child, so that the fact that the father lives apart from the child as authorized or required by a court order can hardly be deemed a desertion."

In regard to the effect of a pending divorce suit upon desertion as a ground for divorce from bed and board, this court said: "Time elapsing during the pendency of a divorce case may not be added to or counted in the period required to establish a claim of 'utter desertion' under the statute. The parties have a right as a matter of public policy to assert their claims in court, and even though judicially found to be groundless, should not bear the risk of having their right to be heard defeated by the danger of the length of the period of time elapsing during the pendency of the litigation. * * * 'It is elementary that while a divorce proceeding is pending the parties must live separate and apart. Such a separation is not wrongful, hence a charge of abandonment cannot be based thereon. * * * such tacking of time cannot be had, * * *.' To require cohabitation, with the implication of intercourse and foregiveness during the pendency of a divorce case in order to defeat a subsequent possible claim of desertion, would be against public policy * * *." Upah v. Upah, 175 Neb. 606, 122 N. W. 2d 507.

Leave should ordinarily be given to withdraw a plea

of guilty if it was entered by mistake, or under a misconception of the nature of the charge through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; when made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury. If such a plea has been received by the court without observance of the precautions and solemnities required by law, the court should permit the plea to be withdrawn. On the other hand, if a defendant, with full knowledge of the charge against him and of his rights and the consequences of a plea of guilty, enters such a plea understandingly and without fear or persuasion, the court may, without abusing its discretion, refuse to permit him to withdraw it. See, 14 Am. Jur., Criminal Law, § 287, p. 961, and cases cited in the notes thereunder. See, also, 22 C. J. S., Criminal Law, § 421, p. 1138; Annotations, 20 A. L. R. 1445, 1454, 66 A. L. R. 628, 638, 149 A. L. R. 1403, 1413.

The question before this court is, could the defendant be guilty of abandonment of his wife and children on May 17, 1965, when on November 28, 1962, defendant's wife obtained a restraining order and on December 5, 1962, the same order was continued. The court ordered allowances for support, which order was still in effect to January 20, 1966. Further, by a stipulation between the State and the defendant, on January 20, 1966, the restraining order was in force and effect.

If any violation of the restraining order occurred or nonpayment of support, the defendant could have been brought before the court as provided by section 25-2121, R. R. S. 1943, which deals with contempts. As stated in Colling v. State, *supra:* "* * * there must be both an abandonment and neglect to support and both without just cause." When, as in this case, a person, by judicial order, is separated from his wife and children, no illegal abandonment could occur.

The judgment is reversed and the cause remanded

with directions to allow the defendant to enter a plea of not guilty, after which this cause shall be dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

FRANK J. MURPHY ET AL., APPELLANTS, V. HOLT COUNTY COMMITTEE OF REORGANIZATION OF SCHOOL DISTRICTS ET AL., APPELLEES.

147 N. W. 2d 522

Filed December 29, 1966. No. 36332.

1. **Quo Warranto: Schools and School Districts.** An action in quo warranto is a proper remedy to determine the validity of the organization of a school district.
2. **Declaratory Judgments.** Ordinarily, an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.
3. **Elections: Quo Warranto.** The statute has provided an adequate remedy for the settlement of the rights of parties in election cases by either contest or quo warranto and these remedies are exclusive.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Norman Gonderinger and Leo F. Clinch, for appellants.

Wagoner & Grimminger, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ., and FLORY, District Judge.

BOSLAUGH, J.

This is a suit for a declaratory judgment to determine the validity of the organization of School District No. 25 of Holt County, Nebraska. School District No. 25 is a Class VI district which was organized by the election method.

The plaintiffs are electors residing within the area of the district. The defendants are School District No. 25; the members of its board of education; the Holt County

Committee for the Reorganization of School Districts; and its members.

The petition alleged that the organization of School District No. 25 was void because the county committee was illegally constituted and appointed; that proper meetings required by law were not held; that proper notice of hearings required by law were not given; that proper notice of changes of the reorganization plan were not given; that the reorganization plan submitted was not approved by the state committee or the county committee; that the boundaries of the reorganized districts were not correct; and that the plan of reorganization contained no definite statement as to the location of a site for the school. The petition further alleged that the election at which the plan was submitted was void because the notice of election was not in the manner and form as provided by law; that the notice of election contained irregularities and inaccuracies; that the plan submitted was not approved by either the state committee or the Holt County committee; that the division of the district into wards was arbitrary, capricious, and inequitable; that proper polling places were not provided; that proper equipment for voting was not provided; that the election was not held in the manner and form as required by law; that the votes cast were never counted by the proper officials; and that no official result of the election is available.

Motions to dismiss and for a summary judgment filed by the defendants were sustained. The plaintiffs have appealed.

Although the motions filed by the defendants were denominated a motion to dismiss and a motion for summary judgment, they were, in effect, demurrers. The defendants attacked the sufficiency of the allegations in the petition to state a ground for declaratory relief, and alleged that the plaintiffs had other adequate remedies at law which were exclusive. In sustaining the defendants' motions the court found that the plaintiffs had

adequate remedies at law, either by quo warranto proceedings or contest of election, which remedies were exclusive, and that declaratory relief should be denied. This case will be considered here upon the same theory as that upon which it was submitted to the trial court.

An action in quo warranto is a proper remedy to determine the validity of the organization of a school district. State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626. See, also, Dappen v. Weber, 106 Neb. 812, 184 N. W. 952; State ex rel. Tanner v. Warrick, 106 Neb. 750, 184 N. W. 896; School District D v. School District No. 80, 112 Neb. 867, 201 N. W. 964.

Ordinarily, an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law. Scudder v. County of Buffalo, 170 Neb. 293, 102 N. W. 2d 447; Stewart v. Herten, 125 Neb. 210, 249 N. W. 552. The purpose of the Declaratory Judgments Act is to provide a procedure for the speedy determination of issues which would otherwise be delayed to the possible injury of the parties. It created no new cause of action and provided no cumulative remedy.

To the extent that the plaintiffs wished to contest the election at which the plan was submitted, the remedies of contest or quo warranto were available and were exclusive. Longe v. County of Wayne, 175 Neb. 245, 121 N. W. 2d 196.

The petition itself was defective and further subject to demurrer in that the allegations were not factual and many of the grounds stated would not support a collateral attack against the organization of the district.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF FAYE PARSONS, DOING BUSINESS AS FALLS CITY-LINCOLN STAGE LINE.

FAYE PARSONS, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

147 N. W. 2d 521

Filed December 29, 1966. No. 36333.

Public Service Commissions: Appeal and Error. An order of the Nebraska State Railway Commission which is sustained by the evidence is not unreasonable or arbitrary and will be affirmed upon review.

Appeal from the Nebraska State Railway Commission. Affirmed.

Harold L. Gurske, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

BOSLAUGH, J.

The applicant, Faye Parsons, operates a bus line between Falls City and Lincoln, Nebraska, under the name of Falls City-Lincoln Stage Line. The application sought authority to change the route over which the bus line operates. The commission found that the proposed service was not required by present or future public convenience and necessity and denied the application The applicant has appealed.

The applicant's present route runs from Falls City through Humboldt, Table Rock, Pawnee City, Tecumseh, and into Lincoln. The applicant proposes a route through Auburn which would eliminate Humboldt, Table Rock, and Pawnee City but would rejoin the present route at Tecumseh.

The applicant produced evidence tending to show that the bus line operated at a loss of more than $6,300 in 1965. The one-way distance over the proposed route is

approximately 5 miles less than that of the present route. The applicant contends that the proposed route would result in a decrease in operating expense, estimated to amount to about $2,800 annually, and that this saving is necessary if the applicant is to continue in operation.

The examiner's report challenged the accuracy of the financial information submitted by the applicant. The statements do not appear to have been audited. Some of the expense items appear to be erroneous. It is not clear how the estimated saving in operating expense was computed. Exhibit 3, introduced by the applicant, seems to indicate that Humboldt, Table Rock, Pawnee City, and Steinauer Corner generated about 23 percent of the applicant's passengers in 1965. The evidence does not show what revenue loss would result from the elimination of these stops on the proposed route.

There is no evidence as to the revenue applicant would realize from traffic to be generated on the new portion of the proposed route. There was testimony that some passengers might be obtained from Peru and Peru College located about 11 miles northeast of Auburn, and that the proposed route would permit a south-bound connection from Lincoln with the Greyhound Bus Line at Auburn. There was no estimate as to the volume of traffic which the applicant expected to receive from the new portion of the route.

Before the commission may issue a certificate of public convenience and necessity it must find that the proposed service is or will be required by the present or future public convenience and necessity. § 75-311, R. S. Supp., 1965. A certificate of public convenience and necessity for regular route transportation of passengers is improperly issued in the absence of proof of both public convenience and necessity. The Greyhound Corp. v. American Buslines, Inc., 178 Neb. 9, 131 N. W. 2d 664.

The burden was on the applicant to show that the proposed service was required by public convenience and necessity. The record sustains the finding of the com-

mission that the proposed service was not required by present or future public convenience and necessity and shows that the order of the commission was not unreasonable or arbitrary.

The order of the Nebraska State Railway Commission is affirmed.

AFFIRMED.

GERHARD MOMMSEN ET AL., APPELLEES AND CROSS-APPELLEES, V. SCHOOL DISTRICT NO. 25, HOLT COUNTY, NEBRASKA ET AL., APPELLEES AND CROSS-APPELLANTS, EUGENE R. HOFFMAN ET AL., INTERVENERS-APPELLANTS AND CROSS-APPELLEES.

147 N. W. 2d 510

Filed December 29, 1966. No. 36334.

1. **Elections.** Absentee voting is a privilege granted an elector, and is not an absolute right.
2. ———. Laws regulating the privilege of absentee voting have generally received a strict construction.
3. ———. It is mandatory that ballots, including those sent to absent voters, be endorsed on their back by the proper election official and any ballot not so endorsed is void and must be rejected.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded with directions.

Norman Gonderinger and Leo F. Clinch, for appellants.

Wagoner & Grimminger for appellees School Dist. No. 25 et al.

Jewell & Otte, for appellees Mommsen et al.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ., and FLORY, District Judge.

BROWER, J.

This is an action to contest the results of a special elec-

tion held on December 11, 1965, in School District No. 25, Holt County, Nebraska, at which a proposition to issue bonds not to exceed $696,700 to purchase a school site and build and equip a schoolhouse thereon was submitted to the electors. The counting board at the election found and certified that 842 ballots were cast at the regular polling places within said district, of which 463 were for and 379 against said proposition. All absentee voter ballots, six in number, were rejected. Because the statute required the proposition to carry by a 55 percent vote, it failed, receiving only 54.98 percent of the total ballots cast. The canvassing board certified its finding to the district court on its request. That board reached the same conclusion with respect to the vote at the polls and the result, but certified the circumstances surrounding the procurement, return, and the voting with respect to the six mail votes.

After the election, Gerhard Mommsen and Irene Mommsen, husband and wife, and Chris B. Worden and Mary Worden, husband and wife, who as absentee voters had attempted to cast ballots by mail, brought this action as plaintiffs in the trial court to contest the results of the election. The designated defendants were School District No. 25, Holt County, Nebraska; John H. Kitchens; James R. Davis; Fred Fundus; Richard Brauer; Vernon Thompson; Evan Garwood, Members of the Board of Education of School District No. 25, Holt County, Nebraska; and Members of the Canvassing Board thereof.

Eugene R. Hoffman and Donald Shald, residents, taxpayers, and legal voters of the district, filed a petition in intervention opposing the plaintiffs' petition.

A trial in district court resulted in a finding and judgment that two of the six mail ballots, which were stipulated to have been yes votes, were valid and the other four were invalid which resulted in 465 votes for the proposition, being the required 55 percent of the votes

cast. The trial court thereupon in its judgment found and declared the proposition to have carried.

Interveners then moved for a new trial and have as appellants appealed to this court from an order overruling their motion. The plaintiffs appear in this court as appellees and the defendants have filed a brief as cross-appellants, which to all intents and purposes agrees with that filed by the plaintiffs-appellees. Hereafter the interveners will be designated as the appellants and all the others collectively as appellees.

Either by admissions in the pleadings or stipulations of the parties, the facts have all been resolved and none are in dispute. All of the voters who attempted to vote by mail were admittedly electors of the district and the legality of the six mail votes cast presents the only issue before us. Two voters are shown to have marked their ballots "no" and four "yes."

Appellants assign error to the trial court in holding that the provisions of the statutes, requiring all ballots to be endorsed on the back by the election officer, was directory and not mandatory. No such endorsement appeared on any of the six mail ballots. Appellants therefore contend that as the mandatory provisions of the statutes were not complied with in respect to all of these ballots they must all be rejected which would require a reversal of the judgment.

We sustain the assignment.

Section 10-703.01, R. R. S. 1943, provides in part: "In all elections where Class I, II, III, or VI districts are voting on the question of issuing bonds of the district, the school board or board of education shall designate the polling places, prepare the form of ballot, and appoint the election officials. * * * When the polls are closed the election board shall deliver the ballots to the county clerk or election commissioner who, with the two disinterested persons appointed by him, shall proceed to count the ballots. Absent and disabled voters ballots shall be issued by the secretary of the board in the

same manner as provided in Chapter 32, article 8, and returned to the secretary as provided therein. Absent and disabled voters ballots cast at the election shall be counted by the same board as counted the ballots at the election and in the same manner as absent and disabled voters ballots are counted." Section 32-716, R. R. S. 1943, provides: "The provisions relating to general elections shall govern special elections, except where otherwise provided for."

Section 32-819, R. S. Supp., 1965, sets forth detailed provisions with respect to the application for and the receipt of election supplies by an absent or disabled voter. The section concludes with the following sentence: "Before issuing ballots to such applying voter, or to the agent of such applying voter, as the case may be, the county clerk or election commissioner shall identify the same by endorsing his name and official title on the back of the ballot." Section 32-808, R. R. S. 1943, describing how the voter shall cast his ballot, provides in part that the voter shall "exhibit the ballot unmarked to such official and forthwith, in the presence of the official and in the presence of no other person, but in a manner that the official cannot see how the ballot is marked, mark the ballot and fold it so that the endorsed name and title of the county clerk or election commissioner is exposed and all other marks are hidden. The voter shall deliver the ballot to the official, who shall place the ballot in the identification envelope and seal the same." Section 32-817, R. R. S. 1943, provides for the examination by the canvassing board of the envelopes in which the ballots were transmitted as well as the poll books and ballots themselves, pertinent portions of which are here set out: "The board shall compare the identification envelopes with the absent and disabled voters' poll list prepared as in section 32-807. If the names appearing thereon agree, if the signature of the voter on the identification envelope agrees with that on the application retained by the clerk, if it appears that the

applicant is a qualified voter, and if it does not appear that such voter has already voted at such election or died prior to the day of election, or that the vote is fraudulent, the identification envelopes shall be opened; *and if the ballot has the county clerk's or election commissioner's endorsement thereon the same shall be placed, without having been unfolded, in a ballot box to be provided and known as the absent and disabled voters' ballot box.*" (Italics supplied.) It then proceeds to state that after all the absent and disabled voters' ballots have been received and either deposited in the box or rejected, the box shall be opened and the votes counted.

These provisions closely resemble the statutes which require a voter who appears at a regular polling place to be given a ballot with the names of two judges of election to be endorsed thereon in ink. § 32-450, R. R. S. 1943. The statutory instructions to voters warn them to fold their ballots so as to expose the names on the back. § 32-451, R. S. Supp., 1965. The voter shall then deliver the ballot so folded to the judge who shall approve the signatures on the back. § 32-456, R. R. S. 1943. The judge is expressly forbidden to deposit any ballot in the box without identification by such signatures. It is made a misdemeanor to do so. § 32-462, R. R. S. 1943.

In the early case of Orr v. Bailey, 59 Neb. 128, 80 N. W. 495, the court, with respect to ballots cast at the polls without such endorsement, held: "The requirements of the Australian ballot law, that the names or signatures of the two judges of an election shall be written on the back of each ballot to be used, and that a ballot not so indorsed shall be void, and not counted, are mandatory, and are not inimical to constitutional provisions." The case was cited and followed as to this precise rule in Swan v. Bowker, 135 Neb. 405, 281 N. W. 891.

In Rasp v. McHugh, 121 Neb. 380, 237 N. W. 394, this court discussed the same situation with respect to an absentee's ballot which had been endorsed by one other than an election official and without purporting to be

endorsed by such official. The court there held: "An official ballot, before being sent to a mail voter, is required by section 32-812, Comp. St. 1929, to be identified by the clerk (or election commissioner in counties of over 150,000 population) indorsing his name and title on the back thereof. A voter upon receiving a ballot indorsed simply 'Mrs. Thomas' should at once return the same. It is not a legal ballot and cannot be counted. It is the duty of the voter in such an event to write for a ballot indorsed so that, according to law and the instructions sent him with the ballot, he can, after marking his choice thereon, fold the same so that the indorsed name and title of the official are exposed on the back thereof when he hands it to the notary public or other officer to be placed in the official envelope by such officer." Indeed as held in McMaster v. Wilkinson, 145 Neb. 39, 15 N. W. 2d 348, 155 A. L. R. 667, absentee voting is a privilege granted an elector, and is not an absolute right. Laws regulating the privilege of absentee voting have generally received a strict construction. And in Arends v. Whitten, 172 Neb. 297, 109 N. W. 2d 363, these same rules are cited from McMaster v. Wilkinson, *supra,* and the court concluded: "We see no reason to change this rule."

The appellees in the present case apparently concede that this court has long held that the endorsement of the ballots by judges of election, when cast at the polls, or by the proper election official, when cast by mail, is mandatory. They contend, however, that this court has relaxed many rules with respect to what the appellees assert are technicalities and should now do so with respect to the requirement of the endorsement of ballots by the election officials. They point out that in the present case those who here voted by mail are conceded to be lawful electors, that it is known how they voted, and all parties admit no fraud is involved. In fact, they seem to contend that there are so many precautions provided and checks taken in the law governing voting by

mail and so many others were applied in the present instance that the accumulated effect of the many used should cure or offset the defect now being considered. They maintain that the statutes requiring the endorsement of the ballots by election officials are to prevent the stuffing of the ballot boxes and that does not occur in voting by mail, and certainly not in the present case. The "Australian ballot law" or system is discussed by this court in Orr v. Bailey, *supra,* and it appears that not only stuffing the ballot box but also the secrecy of the electors' votes are involved. If some votes were endorsed and some not, secrecy might be destroyed. Nor should this court change its rule because such secrecy appears unnecessary in a particular case. Vagueness would result as to which instances the rule should be applied.

Appellees maintain that it is the policy of the law to prevent the disfranchisement of electors who have cast their ballots in good faith, and, while the technical requirements of the absentee voting law are mandatory, the statutes are so construed that a substantial compliance therewith is all that is required. They cite McMaster v. Wilkinson, 145 Neb. 39, 15 N. W. 2d 348, 155 A. L. R. 667, where the court held an endorsement, " 'Theo H. Berg, by ——————, Deputy,' " the blank being filled in with the written name, was substantial compliance although the title city clerk was omitted. In the present case there was no endorsement whatever and hence no compliance whatever. In reaching its conclusion in Orr v. Bailey, *supra,* the court in its discussion stated: " 'If the statute expressly declared any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the results of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed

to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done, within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.' "

For many years the statute clearly pointed out that no ballots were to be placed in the box at the regular polling place without the endorsement of the judges. This court's decision held that endorsement was necessary and without it the ballot was void and could not be counted. Knowing these decisions, the Legislature enacted statutes dealing with absentee voting closely paralleling those applying to voting at the polls. We also held the compliance with those provisions mandatory. The Legislature has not seen fit since to change these statutes. We think this court should not do so either. It is a legislative matter. We conclude that it is mandatory that ballots, including those sent to absentee voters, be endorsed on their back by the proper election official and any ballot not so endorsed is void and must be rejected.

It follows that all six mail votes may not be counted, in which event the sanction of 55 percent of the qualified voters prescribed by statute has not been obtained and the proposition failed to carry. The judgment of the trial court is reversed and the cause remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

EARLENE HUENINK, APPELLEE, V. IRVIN COLLINS, APPELLEE, IMPLEADED WITH ETHEL M. COLLINS, APPELLANT.

147 N. W. 2d 508

Filed December 29, 1966. No. 36335.

1. **Indemnity: Insurance.** Under the collateral source rule or doctrine, the fact that the party seeking recovery has been wholly or partially indemnified for loss by insurance cannot be set up by the wrongdoer in mitigation of damages, where the wrongdoer did not contribute to the procurement of the insurance.
2. **Trial: Appeal and Error.** Where no motion for mistrial because of alleged misconduct of counsel during final arguments is made, the issue is not before this court for consideration.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Merril R. Reller, for appellant.

Marti, O'Gara, Dalton & Bruckner, for appellee Huenink.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ., and FLORY, District Judge.

FLORY, District Judge.

In this case plaintiff and appellee was a guest passenger in an automobile that was in collision with one driven by defendant and appellant, Ethel M. Collins, on September 25, 1962, in the intersection of Sheridan Boulevard and Fortieth Street in Lincoln, Lancaster County, Nebraska. The automobile in which plaintiff was riding had been proceeding easterly on the boulevard, a four-lane thoroughfare divided by a median and protected by stop signs. The defendant had been proceeding southerly on Fortieth Street. The defendants' vehicle was struck near the southwest corner of the intersection. Plaintiff recovered a verdict against defendant Ethel M. Collins for personal injuries sustained.

Appellant in her brief makes 19 assignments of error. Assignments of error Nos. 1, 2, 4, and 9 are not discussed or argued, are without merit, and will not be considered.

Rule 8a2(3), Revised Rules of the Supreme Court, 1963.

Assignments of error Nos. 5 and 6 relate to the admission into evidence of exhibits 2, 3, and 4. Exhibit 2 is a doctor's bill which appears to be typed and signed. Exhibits 3 and 4 are photocopies of bills for medical expense. They were offered and received into evidence. Later during the course of trial, without having been read or shown to the jury, the trial court out of the presence of the jury vacated his ruling on their admission because of lack of foundation. Subsequently, additional foundation having been laid, they were again admitted into evidence. It appears from the brief and an affidavit filed by appellants' counsel after verdict that the bills had originally contained information on them indicating that they had been paid by a collateral insurance source. Appellant complains of this procedure in the treatment of these exhibits. To have handled them otherwise would have been error. "Under the collateral source rule or doctrine, the fact that the party seeking recovery has been wholly or partially indemnified for loss by insurance cannot be set up by the wrongdoer in mitigation of damages, where the wrongdoer did not contribute to the procurement of the insurance." 25 C. J. S., Damages, § 99(2), p. 1013. The assignments of error are without merit.

By assignment of error No. 3 plaintiff complains of admission into evidence of exhibit 5 which was the normal type assignment to plaintiff by her husband of claims for her medical expenses and lost wages. This assignment apparently has also as its basis the fact that the medical expense was recovered from a collateral source and not actually paid by plaintiff's husband and is likewise without merit.

Assignments of error Nos. 7, 8, and 11 have to do with exhibit 6 which was defendants' own answer and cross-petition and was used by plaintiff in an attempt to establish the family purpose doctrine with respect to appellant's automobile. The trial court found as a matter of

law that the family purpose doctrine did not apply and at the conclusion of plaintiff's case dismissed her petition as against appellant's husband. Whereupon plaintiff withdrew exhibit 6. The jury had not seen the exhibit and the only testimony regarding it was as to its identity, its execution, and one question concerning ownership of the appellant's automobile. Certainly there was no prejudice to appellant. These assignments are without merit.

Assignments of error Nos. 10 and 19 have to do with alleged misconduct of plaintiff's counsel during closing arguments. No record was made of closing arguments. No motion for mistrial was made. Long after verdict and judgment appellant attempted to raise this question by affidavits and by the taking of depositions. While we do not condone the misconduct alleged, if true, the law is clear. Where no motion for mistrial, because of alleged misconduct of counsel during final arguments, is made, the issue is not before this court for consideration. Bruno v. Kramer, 176 Neb. 597, 126 N. W. 2d 885. See, also, Sandomierski v. Fixemer, 163 Neb. 716, 81 N. W. 2d 142, for proper procedure to raise this issue.

Appellant argues that the verdict of $7,600 was excessive and suggests that damages for permanent injuries were awarded. The record shows that the jury was not instructed that plaintiff claimed damages for permanent injury nor were permanent injuries as an element of recoverable damages included in the instructions to the jury. Excessiveness of the verdict was not assigned as error and it clearly was not so excessive as to constitute plain error.

Finally, assignments of error Nos. 12 through 18 and the argument thereon attack instructions Nos. 2 through 6, 12, and 13. These instructions have to do with burden of proof, statutes and ordinances in effect at the time of the accident and the violation thereof, definitions, and general and explanatory instructions pertinent to this type case. They are standard instructions. We have

examined them carefully, together with the other instructions given, and conclude that in this case the jury was fully, clearly, and correctly instructed.

The judgment of the district court was without error and should be and is affirmed.

AFFIRMED.

LARIAT BOYS RANCH, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. BOARD OF EQUALIZATION OF THE COUNTY OF LOGAN ET AL., APPELLEES AND CROSS-APPELLANTS.

147 N. W. 2d 515

Filed December 29, 1966. No. 36358.

1. **Taxation.** It is the primary or dominant use of property which determines its tax exempt character.
2. ———. It is the use of property as distinguished from the use of income from property that is the governing consideration as to whether it is exempt from taxation.
3. **Charities: Taxation.** Lariat Boys Ranch, Inc., determined to be an educational and charitable corporation, and 1,000 acres held to be reasonable and necessary for the purposes of the corporation.

Appeal from the district court for Logan County: HUGH STUART, Judge. Reversed and remanded with directions.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellant.

Robert E. Roeder, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and POLLOCK, District Judge.

SPENCER, J.

This is an appeal from the decision of the county board of Logan County, Nebraska, sitting as a board of equalization, which denied the application of tax ex-

emption to 1,000 acres of land owned by the plaintiff corporation, Lariat Boys Ranch. The district court determined that Lariat Boys Ranch qualified as an educational institution, and granted tax exemption for 200 acres of the land. An appeal was perfected to this court.

The appellant, Lariat Boys Ranch, is a nonprofit corporation located in Logan County, Nebraska, organized to equip, maintain, and conduct a ranch home for indigent and wayward boys under 21 years of age, and to support and educate said boys at said ranch home in an attempt to prepare them to live useful lives. It receives its boys from county welfare departments, juvenile courts, social agencies, and directly from parents. The appellant, which has cared for 62 boys from its organization in April 1956, to the date of trial, maintains a facility with a present capacity of 18 boys. There were 17 in residence at the time of the hearing in the district court.

Appellant owns 1,000 acres of ordinary sandhills grazing land in Logan County which it received as a gift from its director and organizer for the purposes of the corporation. It operates this 1,000 acres, together with 1,600 acres of contiguous rented land, as a ranch. The ranch is operated on a cottage type living arrangement, with six boys living in a home unit with a married couple who serve as their house parents. The corporation operates an approved elementary school with two full-time teachers who live on the ranch. The ranch staff consists of three sets of house parents, the two teachers, the manager, and his wife. The three house fathers assist in the operation of the ranch.

The program for the boys in residence at Lariat Boys Ranch is planned as nearly as possible to approximate ranch living. The boys live together in groups of six as a family unit with foster parents. They perform household and ranch chores, and participate in ranching and farming operations. Each boy has the use of a horse, 20 of which are maintained for their benefit. The

testimony is undisputed that only two horses would be needed for ranch purposes and the remainder are maintained for the use of the boys.

The 1,000 acres are located in three different sections, but constitute one contiguous unit. All but eight acres, which are used as cropland, are in grass. The buildings on the premises have been constructed specifically for the purposes of the corporation. In addition to the buildings now present, there are on the premises steel beams for a gymnasium to be constructed in the future. The improvements occupy seven acres. The buildings are grouped on a five-acre tract. Another two acres, located approximately three-fourths of a mile from the buildings, are used for corral purposes.

The remainder of the 1,000 acres, except for 8 acres of cropland, is used to graze livestock. The corporation owns cattle, most of which were donated by interested persons, although some had been purchased. At the time of the trial there were included second, third, and fourth generation cattle, propagated from those which had been donated. The corporation as of September 30, 1965, owned 396 cattle and 27 horses and ponies.

In addition to the 1,000 acres, the corporation operates 1,600 acres of leased land, much of which is devoted to farming although some is used as grazing land. There was testimony that some of the income of the corporation was derived from pasturing cattle, but the testimony as to how much, if any, of the 1,000 acres was used for this purpose is not evident from the record.

It is the position of appellant that ranch living is the vital part of its rehabilitation program, and that the entire 1,000 acres are not only needed by it for the purposes of the corporation, but that the entire tract is used solely for educational and charitable purposes.

The various exhibits indicate that the ranch is operated at a loss, although the director and his wife have waived their salaries and the rent on the 1,600 acres of leased land has been deferred. While the placement

agencies sending boys to the ranch make contributions to their expenses, the undisputed testimony is that 80 percent of the funds of the appellant come from voluntary contributions which include cash, horses, cattle, and foodstuffs.

It is the position of appellees, who have cross-appealed, that tax exemption herein should be restricted to the five acres upon which the school building and the homes used to house the boys are located. Appellees argue that except for the five acres, the ranch is used for income purposes. Appellees apparently rely on Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N. W. 2d 455, in which we denied tax exempt status to 93 acres which were shown to have been purchased for the purpose of increasing the income for the Platte Valley Academy and not for the primary purpose of providing additional educational facilities for the school. That case is readily distinguishable from this one. There the applicant already had sufficient farm land for any educational purpose associated with its operation.

The trial court determined that appellant qualified as an educational institution. Appellees do not dispute this finding but premise their argument on the theory that appellant does not need more than five acres to operate as an educational institution. Appellees have missed the point. Their premise is too limited. They entirely disregard the charitable nature of the corporation. We determine that the record amply justifies the conclusion that Lariat Boys Ranch qualified as a corporation operating exclusively as an educational *and* charitable institution. The educational facilities are only a part of the total operation. The primary objective of the corporation is much broader than maintaining a school building and living facilities. Ranch life envisions area activities associated with ranch life. Appellees concede that part of the land is used as a playground and the balance is used to graze livestock which we

would believe to be necessary for a ranch operation. The record further indicates that the boys to some degree do ranch chores and help with the ranch and farming operations.

We have consistently held that it is the primary or dominant use of property which determines its exempt character. It is the use of property, as distinguished from the use of income from property, that is the governing consideration as to whether it is exempt from taxation. See, Doane College v. County of Saline, 173 Neb. 8, 112 N. W. 2d 248; Lincoln Woman's Club v. City of Lincoln, 178 Neb. 357, 133 N. W. 2d 455.

Appellant corporation is organized to operate a ranch home for indigent and wayward boys. This is its primary or dominant purpose. What constitutes a ranch home? Certainly more than the five acres used for educational facilities, as contended by appellees. The trial court decided that 200 acres were needed. We assume from the record that this is premised upon the testimony that 10 acres were needed to maintain each horse and that approximately 20 horses are reasonably needed for the work and recreation activities of the boys. It would seem to us that a ranch operation of this type needs not only horses but livestock, and that both require grazing land. How much livestock and how much pasture is not subject to any precise answer. There are too many variables involved. The test must be one of reasonableness, and each case must be decided on its own specific facts.

Appellant's operation began with the gift of 1,000 acres of sandhill grazing land. The corporate name, Lariat Boys Ranch, Inc., suggests its objective. There can be little doubt but that the corporate organizers felt that the 1,000 acres in question were reasonably needed by and were also sufficient for the purposes of the corporation. While the entire tract is ample for the present operation and that which is contemplated for the immediate future, we do not believe it to be excessive.

We therefore determine that the entire 1,000 acres are used for educational and charitable purposes within the ambit of section 77-202, R. R. S. 1943, and should be removed from the tax rolls.

The trial court granted exemption for 200 acres. We modify this judgment to grant exemption to the entire tract of 1,000 acres, and direct that it be removed from the tax rolls. The cause is remanded for the entry of a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1967

FRED SORENSEN, CONTESTANT AND PLAINTIFF, V. WAYNE R. SWANSON, A RAILWAY COMMISSIONER OF NEBRASKA, CONTESTEE AND DEFENDANT, FRANK B. MORRISON, GOVERNOR OF THE STATE OF NEBRASKA, ET AL., DEFENDANTS.

147 N. W. 2d 620

Filed January 4, 1967. No. 36548.

1. **Constitutional Law: Courts.** Except in the exercise of its appellate jurisdiction, the Supreme Court is a court of limited and enumerated powers as provided by Article V, section 2, of the Constitution of Nebraska.
2 **Quo Warranto.** Quo warranto, or a proceeding in the nature thereof, lies only against one who is in possession and user of office, or who has been admitted thereto.
3. **Constitutional Law: Quo Warranto.** An action by the occupant of an executive state office to contest the election of his successor is not an action in quo warranto within the meaning of Article V, section 2, of the Constitution of Nebraska.
4. **Constitutional Law: Elections.** The purported grant of power to the Supreme Court by sections 32-1001.01 and 32-1001.02, R. S. Supp., 1965, to take original jurisdiction of election contests is inhibited by Article V, section 2, of the Constitution of Nebraska, defining the original jurisdicton of the Supreme Court.
5. ———: ———. The amendment of Article IV, section 4, of the Constitution of Nebraska, made in 1960 as follows: "The conduct of election contests for any of said offices shall be in such manner as may be prescribed by law" does not purport to be and is not amendatory of the limited original jurisdiction of the Supreme Court as fixed by Article V, section 2, of the Constitution of Nebraska.
6. **Constitutional Law.** When an amendment to the Constitution

is legally adopted, it becomes a part of that instrument, and its application to subsequent transactions must be considered precisely as though it had been originally adopted as a part thereof in its amended form.

7. **Constitutional Law: Courts.** The limits of the original jurisdiction of the Supreme Court as fixed by Article V, section 2, of the Constitution of Nebraska, may not be increased or extended either by the consent of the parties or legislative enactment.
8. **Constitutional Law: Elections.** The provisions of sections 32-1001.01 and 32-1001.02, R. S. Supp., 1965, purporting to invest the Supreme Court with original jurisdiction to hear and determine election contests are unconstitutional and void in that they contravene Article V, section 2, of the Constitution of Nebraska.

Original action. Demurrers sustained.

Ralph R. Bremers and William L. Walker, for plaintiff contestant.

Viren, Emmert & Epstein, James E. Ryan, and Jack W. Marer, for defendant contestee.

Clarence A. H. Meyer, Attorney General, Gerald S. Vitamvas, Calvin E. Robinson, and Lester R. Seiler, for defendants.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

The plaintiff filed a petition in this court denominated a petition for election contest against the defendant Swanson as contestee and other state officers. Defendants filed demurrers to the petition. Briefs were filed and oral arguments had. The issues raised by the demurrers are now before this court for decision.

The petition alleges that plaintiff is the duly elected, qualified, and acting Treasurer of the State of Nebraska. He filed for reelection to the office on December 17, 1965, and was duly nominated as the candidate of the Democratic party at the primary election following. The

defendant contestee, a member of the Nebraska State Railway Commission, filed for the office of State Treasurer of the State of Nebraska on October 27, 1965, and was duly nominated as the candidate of the Republican party at the primary election following. At the general election held on November 8, 1966, defendant contestee received the highest number of votes for Treasurer of the State of Nebraska and plaintiff received the second highest number of votes for said office. It is alleged that defendant contestee will assume the office of Treasurer of the State of Nebraska on January 5, 1967, unless an action for an election contest is then pending as by law provided.

Plaintiff alleges that the defendant contestee was ineligible to be a candidate for the office to which he was elected in that he is an executive officer within the provisions of Article IV, section 2, of the Constitution, and, therefore, is ineligible to any other state office during the period for which he was elected as a member of the railway commission. It is not disputed that the defendant contestee was a member of the Nebraska State Railway Commission at the time of his filing for the office of Treasurer of the State of Nebraska and serving a term ending in January 1969. Plaintiff prays that the Supreme Court grant leave to file his petition, take evidence, and enter judgment against defendant contestee to the effect that he is ineligible to hold the office of Treasurer of the State of Nebraska, and, in effect, enjoin the defendant contestee from qualifying for the office.

Demurrers were filed to plaintiff's petition on the grounds (1) that the Supreme Court does not have jurisdiction of the subject matter as granted to that court by Article V, section 2, Constitution of Nebraska; (2) that sections 32-1001.01 and 32-1001.02, R. S. Supp., 1965, violate Article V, section 2, Constitution of Nebraska; and (3) that the petition does not state facts sufficient to constitute a cause of action.

The original jurisdiction of the Supreme Court is defined and granted by Article V, section 2, Constitution of Nebraska, as follows: "The supreme court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law." It is argued that the petition is in the nature of quo warranto, and that the delegation of original jurisdiction in quo warranto authorizes this court to assume jurisdiction of the present action.

Quo warranto is a common law remedy. It was in ancient times a high prerogative writ of right for the King against one who usurped, misused, or failed to exercise his office. The common law writ was broadened by statute in England to increase its scope to some extent. 44 Am. Jur., Quo Warranto, § 3, p. 89; State ex rel. Good v. Conklin, 127 Neb. 417, 255 N. W. 925. Many states in the country dealt with quo warranto by statute. In Nebraska, the subject is dealt with in sections 25-21,121 to 25-21,148, R. R. S. 1943. This statute provides that an information may be filed against any person holding office who has committed an act that works a forfeiture of his office. § 25-21,121, R. R. S. 1943. The information may be filed by the Attorney General or county attorney, or by an elector under certain conditions when the Attorney General or county attorney fail or refuse to act. § 25-21,122, R. R. S. 1943. When the defendant is holding an office claimed by another, the trial must, if practicable, determine the rights of the contesting parties. § 25-21,127, R. R. S. 1943. The necessity of obtaining permission of the Attorney General or county attorney does not apply in a suit between the contesting parties under the authority of section 25-21,146, R. R. S. 1943.

The question here presented is whether or not an occupant of a public office may bring an action in quo warranto against one elected to but not holding the office on the ground of the latter's ineligibility. At common

law, quo warranto was applied to the sole purpose of determining the right of an occupant to hold the office and ousting a wrongful possessor. It would appear that this common law rule is applicable except to the extent that it has been modified by statute. Our statute, above cited, has not modified the primary purpose of the common law writ of quo warranto.

At common law, the writ of quo warranto was available only to try the question of usurpation of or intrusion into a public office. This court appears to have adhered to this rule. In State ex rel. Good v. Marsh, 125 Neb. 125, 249 N. W. 295, this court said: "The defendant insists that the information comes too late, for that, if brought at all, it must have been brought before defendant Marsh assumed the duties of the office of county treasurer on January 8, 1931. In this the defendant is in error, for quo warranto, or a proceeding in the nature thereof, lies only against one who is in the possession and user of the office, or who has been admitted thereto. * * * 'Quo warranto will lie only when the party proceeded against is either a de facto or de jure officer in possession of the office, and an office that is vacant is in possession of no one. * * * Quo warranto will not lie before the beginning of the term of office.' "

In State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626, we said: "Quo warranto or a proceeding in the nature thereof lies only against one who is in possession and user of the office or who has been admitted thereto."

Under the foregoing holdings, the petition in this case cannot be construed as one in quo warranto. The plaintiff is admittedly the holder and occupant of the office of Treasurer of the State of Nebraska, and, as such, a writ of quo warranto is not available to him.

The plaintiff contends that the Supreme Court is authorized to take jurisdiction of the case as an election contest under the provisions of sections 32-1001.01 and

32-1001.02, R. S. Supp., 1965. Defendants contend that insofar as these sections of the statute purport to confer original jurisdiction on the Supreme Court, they are unconstitutional and void. The history and foundation for these statutes appear important.

Prior to 1960, it was provided by Article IV, section 4, of the Constitution, in part as follows: "Contested elections for all of said offices shall be determined by both houses of the legislature, by joint vote, in such manner as may be prescribed by law." The foregoing section was amended in 1960 to provide in part: "The conduct of election contests for any of said offices shall be in such manner as may be prescribed by law." The offices referred to in these sections are the executive offices of the state as designated in Article IV, section 1, of the Constitution, which includes the office of Treasurer. It will be observed that the determination of election contests for state officers by both houses of the Legislature was changed to such manner as may be prescribed by law.

Plaintiff contends that the constitutional change had the effect of amending the original jurisdiction of the Supreme Court as defined in Article V, section 2, of the Constitution.

The law-making power is vested in the Legislature. It is for the Legislature, therefore, to determine the manner in which the election contests of state officers are to be decided. This it did when it enacted sections 32-1001 et seq., R. S. Supp., 1965. By sections 32-1001.01 to 32-1001.04, R. S. Supp., 1965, it provides that election contests of named executive state officers, including the office of Treasurer, shall be heard and determined by the Supreme Court.

The delegation of authority to the Legislature to determine election contests by law expands its powers to prescribe the manner and method of determining such contests by eliminating from the Constitution the former provision requiring the Legislature itself to make such

determination. The obvious purpose of the amendment was to remove the restrictions on the exercise of its legislative powers contained in the former provision and thereby permit it to exercise its legislative powers under existing law, unfettered by the limitation of the old constitutional provision. We find nothing in the constitutional amendment authorizing the Legislature to extend the original jurisdiction of the Supreme Court. The Legislature may not in such a manner extend the jurisdiction of this court as fixed by the Constitution.

This question was determined in State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676, supported by previous cases in this court therein cited. In the Barney case, we said: "While it is true, as we have seen, that section 1, art. V of our Constitution provides that the judicial power of the state shall be vested in the tribunals therein named, and by section 2, art. V of the Constitution, the original jurisdiction of the supreme court as distinguished from its appellate jurisdiction is limited to 'all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, (and) habeas corpus,' we are committed to the view that the limits of the constitutional jurisdiction thus conferred may not be increased or extended either by consent of parties or legislative enactment. Bell v. Templin, 26 Neb. 249, 41 N. W. 1093; Edney v. Baum, 70 Neb. 159, 97 N. W. 252; State v. Hall, 47 Neb. 579, 66 N. W. 642; Larson v. Wegner, 120 Neb. 449, 233 N. W. 253."

In Miller v. Wheeler, 33 Neb. 765, 51 N. W. 137, an election contest filed originally in this court and determined on demurrer, this court said: "A more careful examination of the statute and the constitution, however, convinces the writer that the original jurisdiction of the supreme court is confined to the cases specified in the constitution, and that under another name no additional jurisdiction can be conferred. This is a court the primary object of which is to review cases tried in the district courts. It is an appellate tribunal and it is given

original jurisdiction in a few limited cases, most of which are extraordinary remedies for the purpose of preventing a failure of justice. It is argued with considerable force that this proceeding is a branch of the action of quo warranto; in fact is such action in all but in name. It is sufficient to say that it is not an action of quo warranto, and it is unnecessary to point out the differences between the two. It is evident that the court has no original jurisdiction in this class of cases. Neither can the legislature clothe this court with power as a board to hear contest of election cases, as the duties of the court are essentially judicial and cannot be perverted from that purpose."

Except in the exercise of its appellate jurisdiction, the Supreme Court is one of limited and enumerated powers. State ex rel. Good v. Conklin, *supra*. Where a cause of action is not listed in Article V, section 2, of the Constitution, the limitations of the constitutional provision are effective in prohibiting the original jurisdiction of the Supreme Court. The contention that the amendment of Article IV, section 4, of the Constitution in 1960 infers the amendment of Article V, section 2, of the Constitution, cannot be accepted. The adoption of an amendment into the Constitution is treated as if such amendment was a part of the original Constitution. State ex rel. Mortensen v. Furse, 89 Neb. 652, 131 N. W. 1030. In the last case cited it was said in the syllabus: "When an amendment to the constitution is legally adopted, it becomes a part of that instrument, and in its application to subsequent transactions must be considered precisely as though it had been originally adopted as a part thereof in its amended form." See, also, County of Cass v. County of Sarpy, 63 Neb. 813, 89 N. W. 291. The 1960 amendment makes no reference to Article V, section 2, of the Constitution, and it was, in terms, an extension of the existing legislative powers of the Legislature. In construing a constitutional amendment to ascertain intent of the people in adopting it, courts must find such

intent in the language of the amendment itself and must not hold that the people intended anything different than the language employed imports. Ramsey v. County of Gage, 153 Neb. 24, 43 N. W. 2d 593; State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N. W. 2d 625. This is consistent with the rule of construction that it must be construed as if it were a part of the original Constitution.

On the basis of the foregoing, we conclude that the petition in the instant case is an election contest and not one in the nature of quo warranto. The petition does not state a cause of action which may be filed originally in the Supreme Court under the limited original jurisdiction of this court as fixed by Article V, section 2, of the Constitution. We conclude also that sections 32-1001.01 and 32-1001.02, R. S. Supp., 1965, are unconstitutional and void in that they are in contravention of the limited original jurisdiction of the Supreme Court as fixed by Article V, section 2, of the Constitution.

For the foregoing reasons, the demurrers of the defendants to the petition of the plaintiff are sustained.

DEMURRERS SUSTAINED.

FRED J. BURGER ET AL., APPELLANTS, V. CITY OF BEATRICE, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

147 N.W. 2d 784

Filed January 6, 1967. No. 36292.

1. **Injunction: Eminent Domain.** An injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain.
2. **Constitutional Law: Eminent Domain.** The Constitution of Nebraska and legislative acts pursuant thereto are in no sense a grant of power, but are limitations of the power of eminent domain. The Legislature may limit the sovereign power of eminent domain, but it lacks the power to extend it.
3. **———: ———.** A use under the power of eminent domain must be a public use, and whether or not a use is public or private is a judicial question and not a legislative one.

4. **Municipal Corporations: Public Utilities.** A city in engaging in the production and distribution of water for the benefit of its inhabitants is engaged in a proprietary capacity rather than a governmental one. When engaging in an ordinary business enterprise, a city is bound by all the rules of substantive law and procedure applicable to any other private corporation or person engaged in a like enterprise.
5. ———: ———. When the city engages in a public utility business, it must provide water service to all inhabitants alike who desire it at the same rate for the same service.
6. **Municipal Corporations: Eminent Domain.** The production and distribution of water for the inhabitants of a city is for a public purpose within the meaning of the power of eminent domain.
7. **Municipal Corporations: Public Utilities.** The power of a city of the first class to contract for the sale of water outside the city's corporate limits, as provided by section 19-2701, R. R. S. 1943, is contractual and permissive and in no sense mandatory or the result of a duty imposed by legislative action or otherwise.
8. **Constitutional Law.** Under the provisions of Article I, section 25, Constitution of Nebraska, every citizen has a right to the acquisition, ownership, possession, enjoyment, or descent of property.
9. **Constitutional Law: Eminent Domain.** The private property of a citizen may be taken from him by the sovereign power of eminent domain only when it is taken for a public purpose. It cannot be taken for a private use.
10. **Municipal Corporations: Public Utilities.** Contracts for the sale of water outside the corporate limits of a city, as authorized by legislative enactment, are contractual and not for a municipal public purpose.
11. **Municipal Corporations: Eminent Domain.** The sale of water by a city outside its corporate limits to a private person, corporation, or industry for his or its own private purpose is not a public use within the meaning of the doctrine of eminent domain.
12. **Eminent Domain.** The character of the use, and not its extent, determines the question of public use. Where there is simply a public interest as distinguished from a public use, the power of eminent domain cannot be exercised. In determining whether or not the exercise of the power of eminent domain exists under the evidence, the courts look to the substance rather than to the form, to the end rather than to the means.
13. ———. When the purposes for the taking of private property by the exercise of the power of eminent domain are in part pub-

lic and part private, and the two are not severable, the right to proceed by condemnation must be denied.

14. ———. When the private and public purposes in a condemnation proceeding are severable, the court may proceed as to the public purpose and deny the right to condemn as to the private purpose.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Reversed and remanded with directions.

Asa A. Christensen and Clayton K. Yeutter, for appellants.

Anne P. Carstens and Perry, Perry, Sweet & Witthoff, for appellees.

Stewart, Calkins & Duxbury and David L. Crawford, for amicus curiae.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

CARTER, J.

Plaintiff landowners brought this action to enjoin the City of Beatrice from proceeding in eminent domain to take restrictive easements over their lands for the installation of water wells and the withdrawal of ground water from beneath the surface of their lands. The trial court denied an injunction and the plaintiff landowners have appealed.

The evidence shows that in the fall of 1964, the City of Beatrice maintained a water distribution system for the inhabitants of the city. It operated 4 water wells in a well field 6 or 7 miles northwest of the city in an area near the Big Blue River. These wells, referred to in the record as wells Nos. 1, 2, 3, and 4, are located on the right-of-way of the Chicago, Burlington & Quincy Railroad, running in a northwest-southeast direction. The railroad right-of-way crossed the lands of plaintiffs. The wells were spaced 1,100 feet apart and were manned with pumps and two 14-inch pipelines which transported

the water to the city of Beatrice. The wells and water mains had the capacity to produce and deliver 6,000,000 gallons of water per day to the city. It was determined by the city prior to the events instigating this litigation that the maximum water needs of the city were inadequate even though the city was able to provide the water needs of the city and its inhabitants in 1964.

In 1964 and following, the Phillips Petroleum Company and the Cominco Products Company established fertilizer plants approximately 6 miles northwest of Beatrice near the unincorporated village of Hoag and near the water mains located between the city of Beatrice and its existing well field. Hoag is less than 1 mile southeast of the well field. On February 3, 1965, Phillips entered into a contract for the purchase of water from the city for the use of the new plant. This contract provided for the delivery of an estimated average of 50,000,000 gallons of water per month with a maximum of 90,000,000 gallons per month. At the time of trial, a similar contract with Cominco was near completion. The negotiations indicated that Cominco required an average usage of 35,000,000 gallons of water per month with a maximum of 90,000,000 gallons per month.

With the foregoing situation existing, the city determined that a need existed for the extension of its well field by 4 wells. On March 19, 1965, the city entered into a contract with the Chicago, Burlington & Quincy Railroad by which it obtained an easement to install new wells on the railroad right-of-way. The final plan of the city was to extend its existing line of wells to the northwest with 1,100-foot spacing from well 4, the farthest northwest well of the existing wells. The plan required the easements here sought to permit the withdrawal of water by the pumps installed from the ground waters underlying plaintiffs' lands. To obtain these easements, the city negotiated with the plaintiffs and, failing this, the city instituted the condemnation proceeding here involved on April 8, 1965. On April 22, 1965, this action

was commenced to enjoin the condemnation proceedings for the reasons hereinafter discussed.

The evidence shows that Phillips and Cominco are private corporations engaged in the production of commercial fertilizers for profit. It also shows that the water requirements of these two companies will equal or exceed the previous requirements of the city of Beatrice. On the foregoing facts it is urged that the condemnation proceeding is for a private purpose and not a public purpose as required by the law of eminent domain.

It is first urged by the city that injunction is not a proper remedy for the reason that plaintiffs have an adequate remedy at law. The rule is: This court is committed to the rule that injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. Consumers Public Power Dist. v. Eldred, 146 Neb. 926, 22 N. W. 2d 188; Heppe v. State, 162 Neb. 403, 76 N. W. 2d 255.

The power of eminent domain is a sovereign power which exists independent of the Constitution of Nebraska. The Constitution of Nebraska and legislative enactments pursuant thereto are in no sense a grant of power, but are and should be treated as a limitation of the power of eminent domain. Consumers Public Power Dist. v. Eldred, *supra*. The Legislature may limit the sovereign power of eminent domain but it lacks the power to extend it. The absolute power of the sovereign authority to take private property for a public use has been limited by the Constitution of Nebraska by subjecting the taking to the payment of compensation for the land taken and the damages to property not taken. Art. I, § 21, Constitution of Nebraska. But it is essential that a use under the power of eminent domain must be a public use, and whether or not the use is public or private is a judicial question and not a legislative one.

A city in engaging in the production and distribution of water for the benefit of its inhabitants is engaged in a

proprietary capacity rather than a governmental one. The distinction between its governmental status and its proprietary capacity have been made in the past by this court. In Henry v. City of Lincoln, 93 Neb. 331, 140 N. W. 664, 50 L. R. A. N. S. 174, this court in dealing with the nature of the city's proprietary capacity said: "It is no part of its duty, as a municipal corporation, to engage in a purely business or commercial enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is purely voluntary on its part, and it thereby assumes a third relation, separate and distinct from the dual relations above considered. While occupying this third relation no governmental functions or corporate duties, as a municipality, devolve upon it. It is then engaged in an ordinary business enterprise, and is bound by all the rules of law and procedure applicable to any other private corporation or person engaged in a like enterprise. It has no greater or higher privileges or immunities than are possessed by any other private corporation." See, also, Incorporated Town of Sibley v. Ocheyedan Electric Co., 194 Iowa 950, 187 N. W. 560.

When it assumes the status of a private utility company in the production and distribution of water for the benefit of the inhabitants of the city, it subjects itself to the same rights and liabilities of a private water company. When it engages, therefore, in a public utility business, it must provide water service to all inhabitants alike who desire it at the same rate for the same service.

It cannot properly be said, and it is not here contended, that the production and distribution of water as above stated is not for a public purpose. Nor can it be said, and it is not here contended otherwise, that the city does not enjoy the right of eminent domain, both within and without the limits of the city, for the purpose of providing an adequate water supply to provide the needs of the city and its inhabitants. The question here raised is whether or not the taking of easements for water to sup-

ply users outside the corporate limits of a city is for a public or private purpose. The question is one of first impression in this state.

The Legislature has power over the very life of a city. It may limit or expand existing powers, or it may destroy the corporate powers of the municipality completely. In the instant case, the city has been invested with the power to contract for the sale of water outside of the city's corporate limits. Section 19-2701, R. R. S. 1943, provides in part: "A city of the first or second class may enter into a contract or contracts to sell * * * water * * * to persons beyond the corporate limits of such a city when, in the judgment of the mayor and council of such a city * * * it is beneficial to any such city to do so." This statute grants the power to the city of Beatrice, a city of the first class, to contract for the sale of water outside of the corporate limits of the city, but the power is permissive and creates no duty on demand to furnish water to users outside the city's limits. Section 16-681, R. R. S. 1943, provides in part that: "Such city owning, operating or maintaining its own gas, water, power, light or heat system, shall furnish any person applying therefor, along the line of its pipes, mains, wires or other conduits, subject to reasonable rules and regulations, with gas, water, power, light or heat." When construed with other sections in Chapter 16, this statute means that it is applicable to persons who are inhabitants of the city. There is nothing to indicate that a person outside the limits of the city could demand as a right the use of the water service of a city. The language quoted from section 16-681, R. R. S. 1943, was first enacted in Laws 1901, chapter 18, section 57, page 275. No different construction has been placed upon it so far as we have been able to find. We conclude therefore that water service to persons outside the corporate limits of the city are contractual and permissive, and in no sense mandatory or the result of a duty imposed by legislative action.

Every citizen has the constitutional right to acquire,

own, possess, and enjoy property. Art. I, § 25, Constitution of Nebraska. A citizen not only may acquire property, but he may sell it at such price as he can obtain in fair barter. State ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607. His property may not be taken from him against his will except by the sovereign powers of eminent domain and taxation, both of which must be for a public purpose. The improper exercise of the power of eminent domain is an infringement upon a citizen's constitutional right to own and possess property. It is essential therefore that the exercise of the power of eminent domain be in strict accordance with its essential elements in order to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right. The authorities are in agreement that a taking of property under the power of eminent domain must be for a public purpose and that it may not be taken for a private one. The problem sometimes arises, as it has in the instant case, as to whether or not a particular taking is for a public purpose.

It has been stated in many cases that "public use," as applied to the exercise of the power of eminent domain, is not capable of precise definition. The term is elastic and keeps pace with changing conditions. One line of decisions holds that the public use means use by the public—that is, public employment—and consequently that to make a use public, a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and that there must be a right on the part of the public, or some portion of it, or some public or quasi-public agency on behalf of the public, to use the property after it is condemned. The opposing doctrine is that public use means public advantage, consequence, or benefit, and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads

to the growth of towns and the creation of new sources for capital and labor, contributes to the general welfare and the prosperity of the whole community constitutes a public use. In any event, the character of the use, and not its extent, determines the question of public use. Where there is simply a public interest, as distinguished from a public use, the power of eminent domain cannot be exercised. 26 Am. Jur. 2d, Eminent Domain, § 27, p. 671.

The first line of decisions referred to in the preceding paragraph is based strictly on the use to which the condemned property is put, and, to make a use a public one, a duty must devolve on the person holding property appropriated by right of eminent domain to furnish the public with the public use intended in pursuance of an existing enforcible public right. In the instant case, the water sold to Phillips and Cominco is not delivered to a public service corporation, nor to a private corporation obligated to serve the public, nor subject to any right of the public to compel a public use. The usual case of a taking by eminent domain is the simple taking of private property for streets, parks, cemeteries, and for water, light, heat, and power as a public service, and other situations falling into similar classifications.

The applicable definitions of public purpose as used in connection with eminent domain proceedings necessarily mean something different in condemnations for drainage ditches, irrigation works, reservoirs, dams, and the like. The broader definition of public purpose supported by the second line of decisions does not contemplate situations such as we have in the instant case.

It cannot logically be argued that "public use," as applied to the exercise of the power of eminent domain, has a fixed definition. Increases in the population and other changing conditions require new and different applications of the power of eminent domain, but such new applications of the power must be for a public and not a private purpose. In most cases where the power

to condemn private property for public use is questioned, the facts of the particular case must be subjected to close examination.

The evidence in this case shows that the withdrawal of underground water from plaintiffs' lands was largely for the use of the Phillips and Cominco companies. The two 14-inch pipelines conveying water to Beatrice continue intact. A new 18-inch pipeline was constructed from the new well field to the point near the Phillips and Cominco plants where they were connected to the 14-inch lines with a valve control installation. A service line has been installed to service the Phillips plant and a second has been installed or will be installed to service the Cominco plant. The new 18-inch pipeline has not been extended into Beatrice although there is evidence that such an extension is contemplated some time in the future. We necessarily draw the conclusion that the water from the 4 new wells is primarily for the purpose of serving the Phillips and Cominco plants.

In our opinion, therefore, the construction of the 4 wells, the withdrawal of the ground water from plaintiffs' lands, and the construction of the 18-inch pipeline was largely for the private use of Phillips and Cominco. We do not doubt that the public interest of Beatrice is subserved by the taking, but public interest does not constitute public purpose within the meaning of the power of eminent domain. The use made of the water by Phillips and Cominco is not such as will be used by the public to such an extent as to make it a public use. Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. N. S. 638; Nichols v. Central Virginia Power Co., 143 Va. 405, 130 S. E. 764, 44 A. L. R. 727.

In State ex rel. Dominick v. Superior Court, 52 Wash. 196, 100 P. 317, 21 L. R. A. N. S. 448, it is said: "Does the fact that the respondent will sell and deliver a portion of its electrical power to third persons and corporations to be by them used for public and municipal light-

ing and in the operation of railroads and railways afford a sufficient reason for denying to it the right of eminent domain? We think not. Courts look to the substance rather than the form, to the end rather than to the means. If in the end the property is devoted to a public use, the mere agency or instrumentality through which that result is accomplished is a matter of no concern."

In the case before us, the end is the furnishing of water for the private purposes of Phillips and Cominco for their private use in the production of commercial fertilizers for profit. It is not even contended that its use is for any other purpose. It is undoubtedly true that the locations of the Phillips and Cominco plants at the places previously described is an asset to Beatrice. It will furnish some employment and increase business in the area, but such a public interest does not constitute a public purpose under the power of eminent domain. If it did, there would be no limit to the exercise of the power for the benefit of private enterprises and the constitutional right of the citizen to own, possess, and enjoy property would be seriously infringed by its subjection to the growing demands of industry for its needs for water for industrial use. The use put to the water by Phillips and Cominco is private and wholly within their control. It does not support a finding that its use is for such a public purpose that it warrants the encroachment of plaintiffs' constitutional rights to the ownership, possession, use, and enjoyment of their property.

We again point out that the furnishing of water for drinking and domestic uses to its inhabitants is for a public purpose under the power of eminent domain in that a city in so doing acts in its proprietary capacity as a public service corporation. In selling water outside of the limits, it is a matter of contract authorized by the Legislature, but as to which it is under no duty to provide by virtue of its status as a municipal corporation or the powers granted to it in its proprietary capacity.

There is evidence in this record that there was and is a

need on the part of Beatrice for additional water for use in emergencies, anticipated growth, and increased use by the city and its inhabitants in the future. We do not here hold that condemnation may not be proper in the fulfillment of these needs. But where a condemnation proceeding under the power of eminent domain purports to take property both for a public use and for a substantial private use as distinguished from a mere incidental private use, the right to proceed by condemnation must be denied. Minnesota Canal & Power Co. v. Koochiching Co., *supra;* Kessler v. City of Indianapolis, 199 Ind. 420, 157 N. E. 547, 53 A. L. R. 1; Shizas v. City of Detroit, 333 Mich. 44, 52 N. W. 2d 589. When the public use is separable from the private use, the court may proceed as to such public use and deny the taking and compensation for the private use. Shizas v. City of Detroit, *supra;* Kessler v. City of Indianapolis, *supra.*

It appears to us that the attempt of Beatrice to take the easements on plaintiffs' lands by eminent domain, insofar as the use by Phillips and Cominco is concerned, is an attempt to obtain private property against the will of the owners for a private purpose, even though for compensation, under the guise of an exercise of its power of eminent domain. This it cannot do. Kessler v. City of Indianapolis, *supra;* Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P. 2d 171; D. N. Kelley & Son, Inc. v. Selectmen of Fairhaven, 294 Mass. 570, 3 N. E. 2d 241.

We conclude that the taking of the easements in the instant case by the power of eminent domain as against the plaintiffs is void to the extent that it is for the private benefit of the Phillips and Cominco companies. To the extent that a need is shown for the taking for the benefit of Beatrice and its inhabitants, if such need is separable, the proceeding may be sustained. In any event, the city of Beatrice should not be permanently enjoined. The injunction, if granted, should run against the present proceeding to the extent that it is unlawful.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

McCOWN and BOSLAUGH, JJ., dissenting.

Judicial interpretation of the term "public use" as applied to the doctrine of eminent domain has been referred to as one of the most controversial and conflicting areas of the law. As indicated by the majority opinion, there are at least two major lines of decision as to interpretation of the term plus another view which takes the position that the term is not susceptible of definition. Some states have adopted one doctrine or the other, and, in many instances, have, at different times, approved both of the main lines of decision as applied to individual cases. Nebraska has been cited in support of both lines of decision in one or another situation.

The majority opinion here presumably adopts the rule that "public use" means "use by the public," that is, public employment—and consequently that to make a use public, a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and that there must be a right on the part of the public, or some portion of it, or some public or quasi-public agency on behalf of the public, to use the property after it is condemned. Even if this limited concept of public use is accepted, in the case where the property is held by a municipally owned public utility, its application logically should not be governed by geographic governmental property lines of the municipal corporation owning and operating the utility.

The majority opinion states that: "* * * the water sold to Phillips and Cominco is not delivered to a public service corporation, nor to a private corporation obligated to serve the public, nor subject to any right of the public to compel a public use." Here the city is itself a public service corporation, admittedly obligated to serve some segment of the public. The majority opinion

concludes that "* * * the end is the furnishing of water for the private purposes of Phillips and Cominco for their private use * * *."

Every private customer of any public utility, whether municipally owned or otherwise, buys or is furnished with the utility service for his, its, or their private use in that sense of the term. This approach assumes that the utility service furnished here by a municipally owned public utility is not furnished as a public utility, but in some separate and different capacity. It holds that some customers of a municipally owned utility are not a part of the "public" the utility is required to serve, even though such service is specifically authorized by statute and actually undertaken, and that the difference lies at the geographical boundary of the city. An important difference is apparently found in the use of the word "contract" for customers outside city limits. Each utility customer is served under a "contract" but rules, rates, and regulations constitute that "contract" in most instances. Here the evidence shows that a rate regulation was adopted by the city, and that the Phillips and Cominco contracts were within that schedule.

The majority opinion apparently concedes that if there were a duty devolving on the city requiring it to furnish water to customers in the position of Phillips and Cominco, the city would then be acting as a public utility and the taking here would be for a public use even under the limited doctrine of public use. The basis for holding that there is no duty or requirement here rests on an interpretation of section 19-2701, R. R. S. 1943, and section 16-681, R. R. S. 1943, as well as interpretation of statutes specifically granting the power of eminent domain to the city for waterworks.

The language of section 19-2701, R. R. S. 1943, that a city of the first or second class may enter into a contract or contracts to sell electric, water, or sewer service to persons beyond the corporate limits of such a city is interpreted as meaning that water service outside the cor-

porate limits of the city was intended by the Legislature to be nothing except an authorization of such service without being subject to any utilities duties, and that even when the power was exercised by a city, it did not extend the waterworks system nor require any utility service outside the corporate limits.

The majority opinion also interprets section 16-681, R. R. S. 1943, as being limited to the corporate boundaries. That section requires any city owning, operating, or maintaining its own water system to "furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, subject to reasonable rules and regulations, with * * * water * * *." That section requires the city to regulate and fix the rental or rate and charges and install meters and regulate the fees and charges for meters. Not one word of that section limits the requirement to the city limits and, in fact, read literally, it does not even require the furnishing of such utility service to every inhabitant of the city, but only requires it along the line of the pipes, mains, or conduits, of its water system.

It should also be pointed out that section 19-2701, R. R. S. 1943, was originally section 16-685, R. R. S. 1943. As that section it has been in effect since 1909. That section used to provide that the city "shall not incur any cost or expense beyond its corporate limits in providing the means for water or sewer service, and such service shall not be instituted or continued except to the extent that the facilities of any city for supplying the service are in excess of the requirements of the inhabitants of such city." In 1957 that section was specifically amended to remove the above-quoted prohibitions and restrictions, as well as to authorize contracts for up to 25 years, and the title of the amendment specifically states those purposes.

Various other sections of the statutes clearly and specifically give the city the power of eminent domain for waterworks both inside and outside the city. See

§§ 16-674, 16-684, 19-701, R. R. S. 1943, and 19-709, R. S. Supp., 1965. At least two of these sections relate only to public utilities of cities, while the others include public utilities with other governmental functions.

The majority opinion states that the property of the companies to whom water service is being furnished is located "near the water mains located between the city of Beatrice and its existing well field." Unless section 16-681, R. R. S. 1943, be interpreted as excluding from the water system all pipes, mains, or conduits outside the city limits, Phillips and Cominco were persons who applied for and were along the line of the city's pipes, mains, and conduits.

The evidence is also undisputed that the municipal water department has many industrial and commercial users outside the city limits and also industrial users inside the city limits. It seems strange indeed to term industrial usage outside the city limits a private use while industrial use within the city limits becomes a public use where the same publicly owned and operated utility system serves both.

This court stated, as early as 1912: "Whether an undertaking is for the benefit of the people at large, and is so general in its nature that it should be regarded as a public utility, must necessarily be within the discretion of the legislature to determine, and, unless it is clearly private in its nature, the courts will not interfere with this legislative discretion. Under such circumstances, it becomes a question of ascertaining the intention of the lawmakers." Lucas v. Ashland Light, Mill & Power Co., 92 Neb. 550, 138 N. W. 761.

As this court stated in City of Curtis v. Maywood Light Co., 137 Neb. 119, 288 N. W. 503, at page 126: "On principle, it would follow that, as the business of maintaining and operating a municipal electric plant and selling current therefrom is wholly outside the truly governmental powers and functions of such city, the place of furnishing or receiving the electric current would be

in no manner controlled by the situs of the same with reference to the corporate boundaries of the cities involved in the transaction."

As this court stated in the Lucas case, *supra*: " 'But to say what a public use is with sufficient comprehensiveness and accuracy to meet the exigencies of all cases is, to say the least, difficult. Nor is it easier to define the limit of legislative power in respect to the right of eminent domain. This power must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements, and the ever varying and constantly increasing necessities of an advancing civilization.' "

As early as Vetter v. Broadhurst, 100 Neb. 356, 160 N. W. 109, 9 A. L. R. 578, decided in 1916, this court stated at page 358: "* * * the generally accepted doctrine is, that in order to constitute a public use the property taken must be placed within the control of the public, or of a public agency or instrumentality, and its use or the rates charged for its use be subject to public control, or it must be within the right of the public to use and enjoy."

This was followed up by the statement on page 362: "The right of eminent domain is thus held to rest on the right to control of rates by the public."

As the majority opinion here points out: "The Legislature has power over the very life of a city. It may limit or expand existing powers, or it may destroy the corporate powers of the municipality completely." The Legislature also has power to govern and control the rates for utility service which it has specifically delegated to first-class cities under section 16-681, R. R. S. 1943.

The water rights here attempted to be condemned will be owned, maintained, and operated by the municipality. The state has declared water to be a public use and its control is entirely in the hands of the Legislature. With the public ownership and development of electrical and water resources in Nebraska in the past few decades, both

inside and outside municipal limits, the time has long since passed when "public use," as applied to a municipally owned utility system, should end abruptly at the city's boundaries, and we believe the legislative intention in that respect is clear. This fact was recognized under a different statute pertaining to electricity and as to an industrial consumer in State ex rel. Dawson County Feed Products, Inc. v. Omaha Public Power Dist., 174 Neb. 350, 118 N. W. 2d 7.

For the reasons stated, we cannot agree with the majority opinion here.

SPENCER, J., concurring.

I am in full accord with the majority opinion herein, but in view of some statements in the dissenting opinion I feel that an additional statement should be made. I agree that judicial interpretation of the term "public use" as applied to the doctrine of eminent domain is a controversial and conflicting area of the law. I suggest, however, that in this case putting the most favorable construction possible on the argument of the dissenters, we still must come to the conclusion that the primary purpose of this condemnation was to take the water of plaintiffs over their protest and turn it over to two large corporations located approximately 6 miles beyond the city limits, for the production of commercial fertilizer for private profit.

The dissenting opinion quotes some dicta from Vetter v. Broadhurst, 100 Neb. 356, 160 N. W. 109, 9 A. L. R. 578, to the effect that the right of eminent domain rests on the right to control of rates by the public. The holding in that case was that the right of eminent domain cannot be exercised for a purely private purpose. That has been and is still the law of this jurisdiction.

The following language from Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371, 102 N. E. 619, 46 L. R. A. N. S. 1196, is very pertinent herein: "The acquisition of land under the power of eminent domain to be devoted to private uses has been recently

considered and discussed somewhat at length. It has been said that the exercise of the power of the State, either through taxation or eminent domain, to take land from one person with the intent of handing it over to another person, is not a public purpose and is contrary to basic and essential principles of free government. Opinion of the Justices, 204 Mass. 607. The underlying objection is that the main end of legislation for this purpose is a private utility rather than the general good. While incidentally it may be an advantage to the public that private persons prosper, if the essential character of the transaction in its direct object is private benefit to individuals, the purpose is not public. In a general sense it is of public interest that the people be well housed, but this does not authorize the State to become the general landlord. That subject is a proper one for the exercise of the police power but not of eminent domain. * * * Private property cannot be taken directly or indirectly for a private end. It cannot be seized ostensibly for a public use and then diverted to a private use. Legislation which is designed or which is so framed that it may be utilized to accomplish the ultimate result of placing property in the hands of one individual for private enjoyment after it has been taken from another individual avowedly for a public purpose is unconstitutional. It would enable that to be achieved by indirection which by plain statement would be impossible. These principles have been expounded at length in early decisions and recent opinions of this court with affluent citation of authorities. (Citing authorities.)"

It seems clear to me that it should not be possible to exercise the power of eminent domain when the purported public use is merely a cloak for an ulterior private use. In Burnett v. Central Nebraska Public Power & Irr. Dist., 147 Neb. 458, 23 N. W. 2d 661, we said: "In Forney v. Fremont, E. & M. V. R.R. Co., 23 Neb. 465, 36 N. W. 806, we stated as follows: 'Eminent domain is the power to take private property for public use. 1

Bouv. Law Dict., 524. It is the power which remains in the government to resume the possession of property upon making just compensation therefor, whenever the public interest requires it. This right of resumption may be exercised when required for the public good in the construction of a railroad, public road, canal, or other like work. The right of eminent domain, however, does not permit the sovereign power to take the property of one citizen and transfer it to another even for full compensation. Beekman v. Saratoga, etc. R. R. Co., 3 Paige's Ch., 73. In other words, the right of eminent domain gives to the legislature the control of private property for public uses, and for public uses only. 2 Kent's Co., 339, and cases cited. This being the rule, the property must be used for the purpose which justified its taking, otherwise it would be a fraud on the owner and an abuse of power, and the authority being in derogation of private right, is to be strictly construed.' "

The dissenting opinion argues that when property is held by a municipally owned utility, public use logically should not be governed by the geographic governmental property lines of the municipal corporation owning and operating the utility. I have no quarrel with this statement if it is confined to the sale of excess water. Here, however, the municipality is not selling excess water, but is taking private property to obtain the water it wishes to sell. I cannot agree this is for a public use, because the city apparently has ample water for city purposes. It is a mere subterfuge to obtain water for the specific benefit of two private corporations located 6 miles beyond its geographic boundaries. If it can do this for these corporations, what would prevent it from extending its jurisdiction to the far boundaries of the state? There must be a line where the right of eminent domain ends. I believe that line is properly drawn in the majority opinion. Condemnation statutes are in derogation of general right and of common law modes of

procedure, and should be strictly construed. Webber v. City of Scottsbluff, 155 Neb. 48, 50 N. W. 2d 533.

I support the view of the majority that when the Legislature delegates the power of eminent domain to a municipality, it must be used for the public use of the municipality. In providing water for domestic purposes for the city, and individual users within the city, it is serving the public purpose as such municipality. When it seeks to secure additional water to serve persons outside the corporate limits of the city, it is not serving a public purpose of the city. The fact that it is permitted to enter into contracts with persons beyond the city limits for the sale of excess water is not, as I view it, an extension of the power of condemnation to secure water in excess of the needs of the city for the purpose of the unlimited extension of its facilities.

The dissenting opinion is wholly concerned with the rights of the city, and the extension of its power to serve private industries outside of the geographical boundaries of the city. It wholly ignores the rights of the landowners whose property is being taken for purposes beyond those necessary for the use of the city and its inhabitants. Those rights in this situation are paramount.

BEDE F. WILLIAMS ET AL., APPELLANTS, V. COUNTY OF BUFFALO, NEBRASKA, ET AL., APPELLEES.
147 N. W. 2d 776

Filed January 6, 1967. No. 36343.

1. **Municipal Corporations.** Annexation of territory by a city of the first class pursuant to L. B. 338, Laws 1963, c. 59, p. 249, now sections 16-106, 16-107, 16-109, 16-110, and 16-110.01, R. S. Supp., 1965, is a legislative matter.
2. ———. In the annexing of property to a city of the first class by ordinance, pursuant to the power delegated by L. B. 338, it is for the mayor and city council, and not the courts, to determine what lands are to be annexed.
3. ———. The power delegated to cities of the first class to

annex lands by ordinance is to be construed strictly, and a failure to comply with conditions prescribed or limitations imposed, will ordinarily invalidate the ordinance.

4. **Constitutional Law: Municipal Corporations.** The delegation of legislative power to a city to annex lands by ordinance does not require the giving of notice and a failure to give notice is not a denial of due process of law.
5. **Municipal Corporations: Quo Warranto.** Where a city has been delegated authority to annex property by ordinance, and the delegated authority has been illegally exercised, the remedy is by an action for an injunction or quo warranto, and not by direct review.
6. **Municipal Corporations.** Where legislative power to annex territory to a city has been delegated by statute to the mayor and council, an appeal from the passage of the ordinance annexing described tracts cannot be made the means of transferring such legislative power to the district court.
7. **Constitutional Law: Courts.** A delegation of legislative power to the courts is violative of Article II, section 1, of the Constitution of Nebraska.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded with directions.

Tye, Worlock, Knapp & Tye and Jeffrey H. Jacobsen, for appellants.

Ward W. Minor, Andrew J. McMullen, Stewart, Calkins & Duxbury, and David L. Crawford, for appellees.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Walter J. Matejka, James E. Fellows, Allen L. Morrow, P. D. Spenceri, Ralph D. Nelson, Vincent D. Brown, Arlyss E. Brown, and Jerry C. Nelson, for amici curiae.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ., and FLORY, District Judge.

CARTER, J.

This is an action for an injunction to enjoin the assessment and levy of municipal taxes by the City of Kearney upon the real and personal property of the plaintiffs.

The trial court denied an injunction and plaintiffs have appealed.

On May 14, 1963, the City of Kearney passed ordinance No. 1711 which had the effect of annexing the lands of the plaintiffs described in the petition to the City of Kearney pursuant to L.B. 338, Laws 1963, c. 59, p. 249, now sections 16-106, 16-107, 16-109, 16-110, and 16-110.01, R. S. Supp., 1965. An appeal was taken from the action of Kearney in annexing plaintiffs' lands. Such annexation was affirmed by this court in Shields v. City of Kearney, 179 Neb. 49, 136 N. W. 2d 174, on July 9, 1965, The constitutionality of L.B. 338 was specifically not decided in the Shields case, the court holding that plaintiffs could not raise that issue after invoking the provisions of the act in their own behalf.

All of the parties to the present action were parties in Shields v. City of Kearney, *supra,* except Williams-Unimart, Inc., and the County of Buffalo. Both of the latter are bound by that case by privity of interest. Under this situation all of the parties in the instant case are bound by the judgment entered in the Shields case. Plaintiffs argue, among other things, that the facts and circumstances disclosed are insufficient to sustain the annexation of plaintiffs' lands to the City of Kearney. We think, however, that this issue was finally settled in the Shields case. In other words, the findings of the Shields case that the evidence was sufficient to sustain annexation under ordinance No. 1711 is a final determination of that issue.

Plaintiffs allege in their petition that L.B. 338 is unconstitutional, first, because of a failure to provide for notice to the plaintiffs as property owners in the area to be annexed and, second, that the act is violative of Article II, section 1, of the Constitution of Nebraska, in that it delegates a legislative function to the courts.

Plaintiffs contend that L.B. 338 is unconstitutional for failure to provide notice to them as landowners in the area annexed before passage of the ordinance. By the

enactment of L.B. 338, the Legislature delegated to cities of the first class the power to annex lands to the city by legislative action if the lands are contiguous or adjacent to the city and are urban or suburban in character and not agricultural or rural in character. The passage of the ordinance presumes a finding that the conditions and limitations contained in the delegating statute exist or have been complied with. The findings of the city council thereon are legislative and are in a sense merged in the ordinance upon its passage. Such action by the city's legislative body does not require notice. The giving of notice under such circumstances is no more required than the giving of notice by the Legislature itself before the enactment of laws. Many decisions of this court have held to this effect and that the failure to give such notice does not bring it within the due process clause of either the state or federal Constitutions. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566; Schlientz v. City of North Platte, 172 Neb. 477, 110 N. W. 2d 58; Kriz v. Klingensmith, 176 Neb. 205, 125 N. W. 2d 674; Hunter v. City of Pittsburg, 207 U. S. 161, 28 S. Ct. 140, 52 L. Ed. 151; City of Cedar Rapids v. Cox, 250 Iowa 457, 93 N. W. 2d 216; City of Tucson v. Garrett, 77 Ariz. 73, 267 P. 2d 717.

The plaintiffs further contend that L.B. 338 is unconstitutional and void in that it confers legislative powers on the judiciary contrary to the distribution of powers section of the Constitution, to wit, Article II, section 1, and, as to the plaintiffs, is violative of the due process of law provision, Article I, section 3, of the Constitution.

It has long been the law of this state that the Legislature may not delegate legislative power to the courts. Winkler v. City of Hastings, 85 Neb. 212, 122 N. W. 858; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257; C. R. T. Corp. v. Board of Equalization, 172 Neb. 540, 110 N. W. 2d 194; McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480.

In Winkler v. City of Hastings, *supra*, power was dele-

gated to the city to sever lands from the city by ordinance. Plaintiff requested the city to sever his agricultural lands and it refused. Plaintiff appealed to the district court. In dismissing the appeal and dismissing the action, this court said: "Briefly stated, the principal objection to the amendment is that by it the legislature attempted to transfer to the district court by appeal legislative power delegated to the city council. The enactment in unambiguous terms confers upon the mayor and council power to detach from the city any five-acre tract used exclusively for agricultural or horticultural purposes. The method of exercising the power delegated is also prescribed by the act. Under its terms territory must be detached by ordinance, the method usually employed by cities in exercising legislative functions. * * * In the form in which the act amending section 4 of the Hastings charter was passed in 1903, the grant conferring upon the mayor and council authority to detach territory by ordinance was legislative. In attempting to confer the same power upon the district court by direct appeal from the action of the mayor and council, if they refuse to pass an ordinance detaching territory on demand of a landowner, the legislature did not observe the following provisions of the constitution: * * * Const. art. II, sec. 1. This section of the constitution prohibits the judicial department from exercising any power properly belonging to the legislative department, and the effort to confer upon the district court legislative authority to sever agricultural and horticultural lands from the city of Hastings in the manner described invalidates the amendment to section 4 of the Hastings charter. This conclusion is not at variance with former holdings to the effect that courts may be clothed with power to inquire into and determine the existence of conditions under which lands may be annexed to or detached from a city, pursuant to the terms of a statute; nor does it conflict with the rule that one whose lands were illegally included within the boundaries of a city may in

a proper case obtain redress in a proceeding in the nature of quo warranto." This same principle is announced in Searle v. Yensen, *supra;* Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490; and others.

The act in controversy provides in part: "Any annexation ordinance duly enacted under section 16-106 effectuating the extension of the corporate limits of such city shall be presumed legal as to territories where the inhabitants do not appeal. Any legal owner of any territory annexed may appeal from the annexation ordinance to the district court of the county in which such city is situated. Such appeal may be taken from the enactment of the ordinance as in other civil actions, but notice of appeal must be given within thirty days from the effective date of such annexation ordinances by filing written notice with the city clerk and by causing a copy of the petition on appeal to be served upon the city in the manner provided by law for service of a summons in a civil action. The city shall file its answer, if it desires to contest such appeal, within thirty days from the filing of the petition on appeal and shall set forth in its answer the grounds for sustaining the ordinance and why the territory should not be eliminated from such annexation ordinance. The case shall be tried by a court as a suit in equity de novo, and the burden of proof shall be upon the city. The court may hear and determine in one suit the appeal of all persons appealing from the annexation ordinance, but shall make specific findings in reference to each tract of land set forth in a petition or petitions on appeal. If the court finds in favor of the petitioner or petitioners, or any of them, it shall enter a decree accordingly. In all cases in which a decree is entered finding that any of the territory described in the proceedings should be eliminated from the annexation ordinance, a certified copy of such decree shall be recorded in the office of the clerk of the city affected thereby. Either party may prosecute appeal from the

finding and decree of the district court to the Supreme Court." § 16-110, R. S. Supp., 1965.

A reading of this section shows that its intent was to lodge jurisdiction in the district court by appeal to review the propriety of the legislative action taken by the city. It prescribed the hearing on appeal to be as one in equity de novo, a plain indication that the court was to assume the position of a superior legislative body in hearing the appeal. This is clearly an attempt by the Legislature to impose a legislative function upon the judiciary and is violative of Article II, section 1, of the Constitution. The proper method of questioning the validity of such legislative action is by collateral attack, that is, by injunction, quo warranto, or other suitable equitable action.

As we have heretofore said, landowners in territory wrongfully annexed to a city by legislative action are entitled to a remedy in order to afford due process. A collateral attack by injunction, quo warranto, or other suitable equitable action affords such remedy. The question immediately arises whether or not the Legislature may properly afford the same remedy by appeal. The Legislature may provide more than one remedy so long as constitutional limitations are not violated. In Tyson v. Washington County, 78 Neb. 211, 110 N. W. 634, 12 L. R. A. N. S. 350, this court said: "Doubtless, however, it is competent for the legislature to prescribe whatever mode of procedure they may see fit for bringing judicial questions before the courts for determination, or for the multiplication of cumulative remedies, * * *." But it will be noted that this rule limits its own scope to judicial questions and does not include questions which are purely legislative.

The legislative power is the power to enact rules of law for the government and regulation of people or property. It involves the exercise of discretion as to the contents of statutes and their policy. The Legislature may delegate legislative powers to others. When it dele-

gates such power to a public officer or administrative agency for the enforcement of its legislative will, the statute of delegation must contain reasonable guidelines and understandable fact standards by which the act will be administered. But when legislative power is delegated to a legislative body, such as the mayor and council of a city, it grants that same power that it has itself, subject to the conditions and limitations imposed upon its exercise. The determination of the existence of the conditions and the compliance with limitations are legislative questions. This court has consistently held as a general rule that the courts cannot inquire into the motive, policy, wisdom, or expediency of legislation. If a person be injured by such legislative action, either by the failure to comply with the procedure provided or a failure to comply with conditions and limitations imposed, injunction provides the remedy on the theory that the person so injured has been deprived of property or other valuable rights without due process of law.

The defendants cite cases in support of their position in which this court entertained appeals from the enactment of an ordinance. A discussion of the principles involved as they affect this case appears necessary. In some of our previous decisions we have apparently confused the conditions and limitations imposed upon the exercise of delegated legislative power with the standards and guidelines required to be imposed on an administrative officer or agency in the enforcement of a legislative act which he is required to administer. The first is legislative and may be attacked collaterally. The second is ordinarily judicial and, if it is, an appeal or error proceeding is a proper remedy.

The departure from principle appears most noticeable in Elliott v. City of Auburn, 172 Neb. 1, 108 N. W. 2d 328. In that case it was held that a condition contained in the statute delegating authority to the city to create a paving district had not been met. It was held that the legality of the ordinance could not be tested by injunc-

tion. We think the case was erroneously decided. An attack upon the legality of an ordinance because the conditions did not exist or limitations have not been restricted which authorizes the council to act may be collaterally attacked, and not by direct appeal or error proceeding. Other cases are cited which are alleged to support the theory that appeals may be taken from the enactment of an ordinance pursuant to the legislative power delegated to it by the Legislature. We content ourselves with the statement of the rules of law applicable to the instant case. If, as asserted, other cases have departed from the fundamental rules herein stated, a further consideration can be had when similar cases reach this court.

We think the correct rule is stated in Wagner v. City of Omaha, *supra,* which holds that where the annexation of lands to a city is by legislative action, constitutional and statutory limitations on the nature and extent of the territory to be annexed must be observed, and where such annexation is illegal injunction is a proper remedy. It is our considered opinion that a collateral attack is not only a proper remedy but the exclusive remedy. We do not mean to infer, however, that an appeal will not lie from judicial or quasi-judicial findings of a public officer or administrative board as to whether or not he or it has complied with standards and guidelines imposed for the administration of a legislative act.

In the instant case, the Legislature delegated the power to the city to include by ordinance any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character within the city. The exercise of the power excluded the right to annex agricultural lands which are rural in character. The determination by the mayor and council that the lands being annexed were not agricultural lands rural in character is a legislative finding essential to the delegated legislative right to annex the lands. Likewise, the finding that

such lands were contiguous or adjacent is a legislative finding necessary to the passage of a valid ordinance. While these legislative findings are necessary to the exercise of the right to annex by ordinance, they are a part of the exercise of the delegated legislative power and are in no sense of the word judicial in character. Since the motive, policy, wisdom, or expediency of legislation is for the Legislature and not the courts, the legislation is presumed constitutional until declared unconstitutional by a proper authority. But an appeal or error proceeding does not lie from a purely legislative act by a public body to whom legislative power has been delegated. If the jurisdictional findings of the legislative body to whom legislative powers have been delegated, such as the mayor and council in the instant case, are not true, and it is so established in a proper action, the ordinance is void as to anyone injured thereby for the reason that it takes property without due process of law.

The foregoing discussion, however, does not apply to the findings of a public officer or administrative agency engaged in the enforcement of a legislative act, when such findings are judicial or quasi-judicial in character. See, Hickman v. Loup River Public Power Dist., 176 Neb. 416, 126 N. W. 2d 404; City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N. W. 2d 629.

In the instant case, the appeal in effect authorizes the district court to consider "the grounds for sustaining the ordinance and why the territory should not be eliminated from such annexation ordinance." The statute further provides that the appeal shall be tried as a suit in equity de novo. This imposes upon the court the duty of serving as a superior legislative body when it requires the city to carry the burden of proof of showing valid reasons for annexing the property to the city. The sum and substance of the statute are that the property will be annexed if the court thinks best. The question as to whether or not the annexing of the property is a question

of public policy is not in any sense a judicial question. In attempting to submit that question to the district court by an appeal from the passage of the ordinance, the Legislature has attempted to make it the means of transferring the legislative power to the district court. As the statute now stands, the court is required to determine what facts shall exist as a basis for the annexation of the property, a purely legislative function, and must be held invalid as an attempt to impose upon the courts the performance of nonjudicial duties, and an unauthorized delegation of legislative power. We hold that L.B. 338 is unconstitutional in that it is inhibited by Article II, section 1, of the Constitution of Nebraska.

The case is an action to enjoin the collection of municipal taxes levied on the property of the plaintiffs. The statute under which the property was annexed to the City of Kearney being unconstitutional, the municipal taxes levied pursuant to such void annexation are likewise void. Injunction being a proper remedy in such cases, the trial court was in error in denying equitable relief.

We do not deem it necessary to decide other issues raised by the parties. The judgment is reversed and the cause remanded to the district court with directions to enter an order enjoining the City of Kearney from assessing, levying, or collecting municipal taxes levied against the lands of the plaintiffs described in their petition.

REVERSED AND REMANDED WITH DIRECTIONS.

HARRY MCENTARFFER, JR., APPELLANT, V. JOSEPH RUDOLPH ET AL., APPELLEES.

147 N. W. 2d 763

Filed January 6, 1967. No. 36345.

1. **Automobiles.** A motorist is under a duty not to exceed the maximum speed that is reasonable and prudent under existing conditions.

2. ———. A speed less than the specific maximum prescribed in a regulation is not necessarily reasonable or prudent.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Sidner, Gunderson, Svoboda & Schilke and William L. Gilmore, for appellant.

Wilson, Barlow, Neff & Watson, for appellee Rudolph.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and FLORY, District Judge.

SMITH, J.

The motor scooter that plaintiff was driving east collided with the automobile that defendant was turning from west to south in an urban intersection. Plaintiff's claim of negligence was submitted to a jury under instructions on contributory negligence in respect to speed, control, lookout, and right-of-way. The jury returned a general verdict for defendant, and plaintiff has appealed. He contends that the evidence is insufficient to sustain an affirmative finding on one specification of contributory negligence—excessive speed.

The intersection, located in Lincoln, Nebraska, was formed by Sixteenth Street for southbound traffic only and by Vine Street for east-west traffic. Sixteenth Street had a 50-foot width at the south side of the intersection. Vine Street had a 30-foot width at both sides. The curb radius of the southeast corner was 16 feet. At the east side the center lane on Vine Street was marked for left turns onto Sixteenth Street. A speed limit of 35 miles per hour was in force, and an automatic signal controlled traffic at the intersection. Standing water in the southwest corner extended 10 feet over the brick surface, and automobiles had tracked the water over the intersection. The collision occurred, however, on a clear afternoon.

Defendant, driving his Chevrolet automobile west on Vine Street, entered the left-turn lane. In obedience

to a red traffic signal he stopped east of the crosswalk. When the signal changed to green, he started his turn. Meanwhile plaintiff was driving the Cushman motor scooter east on Vine Street. In his opinion he entered the intersection at a speed of 20 miles per hour. One bystander saw plaintiff approach the intersection at a speed of 25 or 30 miles per hour. Another observed that 10 yards west of the intersection plaintiff slowed to 5 or 10 miles per hour and then perhaps accelerated somewhat. Plaintiff was in the intersection when he first saw the Chevrolet, which was in the turn lane. He testified:

"It seemed like I was in the intersection already; and just going into it * * * and I noticed he pulled over into the turning lane; but * * * I was halfway through the intersection * * *. * * * it seems like I was just going into the intersection when I saw the car, and it seems like he was in the turn lane. * * * I figured he was going to turn because he was in the turn lane, * * *."

The impact occurred in the southeast quarter, 11 feet east and 13½ feet south of the center of the intersection. Plaintiff was thrown into the air and against the hood and upper grill of the Chevrolet. Damage to both vehicles was considerable in the opinion of the investigating police officer. Areas of damage were the left front bumper, grill, and hood of the Chevrolet, and both sides, front fender, and front fork of the scooter. Skid marks of the Chevrolet were 3 feet long. Skid and slide marks of the scooter began 12 feet east of the west curb line. After the collision the Chevrolet faced southwest in the southeast quarter of the intersection. The motor scooter was located directly west of it, and plaintiff lay between them.

A motorist is under a duty not to exceed the maximum speed that is reasonable and prudent under existing conditions. A speed less than the specific maximum prescribed in a regulation is not necessarily reasonable or prudent. Stillwell v. Schmoker, 175 Neb. 595, 122 N. W.

2d 538. The evidence is sufficient to sustain a finding of excessive speed.

The judgment is affirmed.

AFFIRMED.

ELMER F. BUSBOOM ET AL., APPELLANTS, V. OTIS G. GREGORY ET AL., APPELLEES.
147 N. W. 2d 626

Filed January 6, 1967. No. 36356.

1. **Corporations.** Prior to amendment of the Nebraska Business Corporation Act a domestic corporation under the act might change registered agents without recording a statement of change in the office of the county clerk.
2. ———. Bases of judicial jurisdiction over unwilling foreign corporations are largely statutory.
3. **Corporations: Process.** When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent. § 25-511, R. R. S. 1943.
4. ———: ———. A basis of jurisdiction over such a foreign corporation exists if the corporation is doing business in Nebraska. It also exists if: (1) The cause of action arose out of an act that the corporation caused to be done in Nebraska or elsewhere with consequences in Nebraska, and (2) the act established such a relationship of the corporation to Nebraska that exercise of jurisdiction is reasonable.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Viren, Emmert & Epstein, for appellants.

Thomas A. Woodward, Fraser, Stryker, Marshall & Veach, and Miller, Moldenhauer & Morrow, for appellees Busboom Bros., Inc., et al.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

SMITH, J.

This action against Busboom Bros., Inc., a domestic corporation, and Robbins Floor Products, Inc., an Ala-

bama corporation, was dismissed for lack of personal jurisdiction. The issues on appeal are: Was the person served with a summons against Busboom Bros. a statutory agent for service of process? Was there a statutory basis for jurisdiction over Robbins because of circumstances that Robbins had been associated with Nebraska?

Statutory Agent for Service of Summons Against Busboom Bros., the Domestic Corporation.

The return to summons shows service on Busboom Bros. by personal delivery in Douglas County, on April 9, 1964, to Frank Frost as resident agent. Busboom Bros. so designated Frost in its articles of incorporation, which were filed during 1960 in the offices of the Secretary of State and the county clerk of Douglas County. It revoked the authority of Frost in March 1964, relocating its office in Omaha, Douglas County, and appointing Thomas A. Woodward registered agent. Written notification, unacknowledged but signed by the president, was filed March 12, 1964, in the office of the Secretary of State. It was not recorded, however, in the office of the county clerk of Douglas County. The county records consequently failed to show that the authority of the agent named in the articles of incorporation had been revoked.

Plaintiffs contend that the statutes required Busboom Bros. to record the notification in the office of the county clerk and that the attempted revocation was therefore ineffective. Such a requirement had been a part of the general corporation law, but the law had been repealed in 1963 by the Nebraska Business Corporation Act. Laws 1941, c. 41, § 78, p. 210, former §§ 21-1,142 to 21-1,145, R. R. S. 1943, repealed by Laws 1963, c. 98, § 135, p. 416. The new act mentioned one place alone, the office of the Secretary of State, where the statement was to be filed. The Legislature added a second place, the office of the county clerk, in 1965. Laws 1963, c. 98, § 12, p. 332; Laws 1965, c, 90, § 2, p. 358; § 21-2012, R. S. Supp., 1965.

Plaintiffs say that the specific saving clause of the

1963 act retained the former procedure: "* * * no rights, privileges and immunities vested or accrued by and under prior statutes repealed by * * * (this act), * * * and no duties, restrictions, liabilities and penalties imposed or required by and under such statutes shall be impaired, diminished or affected thereby." § 21-20,130, R. S. Supp., 1965.

The saving clause should not be stretched to preserve a procedure calculated to conceal an action from a corporation. Busboom Bros. followed the plain language of the statute. Had plaintiffs examined the records of the Secretary of State, they would have discovered the notification. They had neither a privilege nor an expectancy in the former procedure.

Plaintiffs also contend that the notification was ineffective because it was not acknowledged. The statute required a registered agent to acknowledge his own statement, but acknowledgement by the president of a corporation was unnecessary. We conclude that Busboom Bros. was not served with summons.

Statutory Basis of Jurisdiction over
Robbins, the Foreign Corporation.

Robbins manufactured floor coverings, which it wholesaled over many years to Busboom Bros. and other independent distributors in Nebraska. Its representatives traveled from outside the state to Omaha where they solicited purchase orders from Busboom Bros. Robbins accepted all Nebraska orders in Alabama or Illinois, and it shipped the merchandise in interstate commerce.

The financial condition of Busboom Bros. became so weak in December 1962, that an Omaha bank refused further aid. Robbins, which was selling on open account, then negotiated in Omaha for an extension of additional credit. It was represented by Thomas Doherty, one of its vice-presidents for sales and an Illinois resident. Robbins extended the credit, but continued financial difficulties led to a transfer of the shares of

capital stock in Busboom Bros. to Florco, Inc., the parent of Robbins.

Plaintiffs, who were residents of Indiana, named four local residents additional defendants: Otis G. Gregory, Lois M. Gregory, Arnol E. Busboom, and Lillian F. Busboom. They sought recovery on alleged contracts to sell shares of capital stock in Busboom Bros. They had agreed in 1960 to sell to the Gregorys 60 per cent of the outstanding shares on condition of approval by Robbins. Robbins contracted in 1963 to purchase those shares and to indemnify the Gregorys for any liability to plaintiffs on the 1960 contract. It also contracted to sell the shares to Arnol E. Busboom, who owned all other shares. Arnol promised to pledge to Robbins all the shares as security for payment of money that Busboom Bros. owed Robbins. Plaintiffs assented in 1963 to a substitution of Arnol and Lillian Busboom as debtors in place of the Gregorys.

After the stock transfer to Florco, Doherty was elected a director of Busboom Bros. In that capacity he traveled to Omaha on April 7, 1964, at the request of Jay Portice, who was the president and a director of Busboom Bros. At the meeting they discussed disposition of inventories and a program for continued sales by Busboom Bros. or another corporation that Portice controlled.

While the two men were meeting in a sleeping room at the Diplomat Hotel, a deputy sheriff delivered the summons against Robbins to Doherty.

There is no significant evidence concerning other activity referable to Nebraska. Robbins neither owned nor possessed real estate. It had no office, stock of merchandise, bank account, or telephone listing. It engaged in no independent course of advertising. It has not appointed an agent for service of process, and it has not qualified to do business.

Because the common law severally restricted judicial jurisdiction over unwilling foreign corporations, bases of jurisdiction now are largely statutory. See, Western

Travelers Accident Assn. v. Taylor, 62 Neb. 783, 87 N. W. 950; Dale Electronics, Inc. v. Copymation, Inc., 178 Neb. 239, 132 N. W. 2d 788. Plaintiffs rely on the following provision of the Code of Civil Procedure: "A summons against a corporation may be served * * * upon its * * * managing agent * * *. When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent." § 25-511, R. R. S. 1943.

If a foreign corporation is doing business in Nebraska, it may be served through its managing agent in the state. Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151. Lacking a usable rule, we conclude without explanation that Robbins was not doing business in Nebraska. See Dale Electronics, Inc. v. Copymation, Inc., *supra*.

The amount of corporate activity in Nebraska has not been the exclusive test of the code provision. We sustained jurisdiction in one case, although the cause of action had arisen out of one or two acts that apparently had been the only corporate activity in Nebraska. Klopp, Bartlett & Co. v. Creston City Guarantee Water-works Co., 34 Neb. 808, 52 N. W. 819, 33 Am. S. R. 660. True, we recognized, sometimes grudgingly, the quantitative test in other cases. See, Chicago, B. & Q. R.R. Co. v. Manning, 23 Neb. 552, 37 N. W. 462; Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co., 49 Neb. 537, 68 N. W. 929; Ord Hardware Co. v. J. I. Case Threshing Machine Co., 77 Neb. 847, 110 N. W. 551, 8 L. R. A. N. S. 770; Pitzer v. Stifel, Nicolaus & Co., Inc., 143 Neb. 394, 9 N. W. 2d 495.

The text of the statute and the state of precedent open the way to modifications. A basis of jurisdiction over a foreign corporation with a managing agent in Nebraska exists if: (1) The cause of action arose out of an act that the corporation caused to be done in Nebraska, or elsewhere with consequences in Nebraska, and (2) the act established such a relationship of the corpora-

tion to Nebraska that exercise of jurisdiction is reasonable. It is unnecessary for us to exhaust applications of the statute.

Robbins was associated with Nebraska because of various circumstances. The negotiations by Doherty probably had some connection with the contracts in suit. The contracts centered on transfers of stock in a domestic corporation, but the Uniform Stock Transfer Act was in force at all times. Laws 1941, c. 42, p. 217, repealed by section 10-102, U. C. C. Although the parties, other than the corporations, resided in Indiana and Nebraska, the evidence fails to show where the contracts were signed. The parties fixed no place for performance, and they expressed no choice of governing law. Florco did not dominate Busboom Bros. in such degree that it disregarded a separate and independent existence; corporate identity was preserved. At the time of service Doherty was not present on business of Robbins, although the interest of Robbins is not discounted. The facts present a close question of state law. We decide that the code provision was not a basis of jurisdiction over Robbins, because exercise of jurisdiction would not be reasonable under the circumstances.

The judgment dismissing the action against Busboom Bros. and Robbins is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES R. CARR, APPELLANT.

147 N. W. 2d 619

Filed January 6, 1967. No. 36382.

1. **Criminal Law. The fact that an appeal in a criminal action has not been docketed in this court is not a jurisdictional defect.**
2. **———. The remedy under the Post Conviction Act is cumulative and is not intended to be concurrent with any other remedy. § 29-3003, R. S. Supp., 1965.**

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Michael T. Levy, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and POLLOCK, District Judge.

SMITH, J.

Defendant moved under the Post Conviction Act to vacate a 12-year sentence imposed upon him as a habitual criminal in a prosecution for burglary. The district court overruled the motion because the files and records showed that defendant was entitled to no relief. He has appealed.

Defendant attempted to allege in the motion errors of law in the trial and deprivation of the right of appeal. A jury had found him guilty of burglary, and the district court had overruled his motion for a new trial October 22, 1964. Sentence was pronounced October 30, 1964.

Defendant took action in the criminal case prior to expiration of the time for appeal. On November 25, 1964, he filed in the office of the clerk of the district court a signed motion and an affidavit of poverty. In connection with his request for a transcript and a bill of exceptions he stated in the motion: "That he wishes to appeal said conviction to the Nebraska Supreme Court by * * * Writ of Error." No certified copy of the motion as a notice of appeal has been forwarded to the clerk of this court. The post conviction proceeding alone has been docketed.

The State tacitly admits that the motion and affidavit met jurisdictional requirements. To us it is clear that defendant has invoked appellate jurisdiction in the criminal case as well as in the post conviction proceeding. See, §§ 25-1912 and 29-2306, R. R. S. 1943; State v. Goff, 174 Neb. 217, 117 N. W. 2d 319.

The post conviction remedy "is cumulative and is not intended to be concurrent with any other remedy * * *." § 29-3003, R. S. Supp., 1965. The overruling of defendant's motion was correct because of the pending appeal in the criminal case, but the denial of post conviction relief is of course without prejudice. The judgment is affirmed.

AFFIRMED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT, V. UNION INSURANCE COMPANY, APPELLEE.
147 N. W. 2d 760

Filed January 6, 1967. No. 36388.

Insurance. Where the coverage of one insurance company under an automobile insurance policy is "excess" insurance because the automobile involved in an accident was a "temporary substitute" automobile, and the coverage of another insurance comany is "excess" insurance because the same automobile was a "non-owned" automobile, and both policies otherwise provide coverage for the loss involved, the "excess" insurance provisions are mutually repugnant, the general coverage of each policy applies, and each company is obligated to share in the loss.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and remanded with directions.

Healey & Healey, for appellant.

Wilson, Barlow, Neff & Watson, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and FLORY, District Judge.

MCCOWN, J.

A deer suddenly jumped onto a highway, and triggered a chain of events which destroyed an automobile, caused minor injuries to the occupants, and brought about this litigation involving complicated and conflicting contrac-

tual provisions in two separate automobile insurance policies.

Everett and Rita Winings had an automobile insurance policy on a 1960 Vauxhall automobile with the plaintiff, State Farm Mutual Automobile Insurance Company. On June 15, 1963, while the described automobile was undergoing repairs at a garage in O'Neill, Nebraska, the garage loaned a 1962 Pontiac Tempest automobile to the Winings. The garage carried no insurance on the Pontiac Tempest covering the loss which occurred. Charles Dobias carried an automobile insurance policy with Union Insurance Company on his automobile under which his son, Rodney Dobias, was an additional insured. That evening Rodney Dobias was driving the 1962 Pontiac Tempest with the permission of the Winings, lawfully in possession of the car. It was at this moment that the unfortunate deer jumped onto the highway. As a result of striking the deer, the 1962 Tempest was a total loss, and Rita and Richard Winings, the children of Everett and Rita Winings, and passengers in the automobile, received injuries requiring medical treament. Both insurance policies had collision, comprehensive, and medical coverage with limits in excess of the amount involved here. State Farm Mutual Automobile Insurance Company, the plaintiff here, paid the owner of the 1962 Pontiac Tempest the amount of the vehicle loss, and paid the medical bills relating to the injuries sustained by Rita and Richard Winings. After demand, this action against Union Insurance Company to recover one-half of the amounts paid followed. No issue of voluntary payment on the part of State Farm is here involved. The district court determined that the State Farm policy was primary and the Union policy excess and dismissed the action.

Relevant portions of the respective insurance policies are essential in determining the issue. The applicable portions of the State Farm policy provide: "The Company * * * agrees with the insured * * * subject to the provisions of the policy: * * *

"Coverage C—Medical Payments. To pay reasonable medical expenses incurred * * *

"Coverage D—Comprehensive (1) To pay for loss to the owned automobile except loss caused by collision * * *

"Coverage G—* * * Collision. To pay for loss to the owned automobile caused by collision * * *

"Definitions.

"Owned Automobile—means the private passenger automobile * * * described in the declarations and includes a temporary substitute automobile * * *

"Temporary Substitute Automobile—means an automobile not owned by the named insured while temporarily used as a substitute for the described automobile when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

"Conditions.

"Other Insurance. * * * All of the foregoing provisions and all coverages are subject to the following: * * *

"(b) The insurance with respect to a temporary substitute automobile * * * and a non-owned automobile shall be excess over other collectible insurance."

The applicable portions of the Union policy provide: "Union Insurance Company * * * Agrees with the insured * * * subject to all of the terms of this policy:

"Coverage C—Medical Payments: To pay all reasonable expenses incurred * * *

"Division 2. To or for any * * * person who sustains bodily injury, caused by accident, while occupying * * * (b) a non-owned automobile, if the bodily injury results from (1) its operation or occupancy by the named insured * * *, or (2) its operation or occupancy by a relative * * *, but only if such operator or occupant has, or reasonably believes he has, the permission of the owner to use the automobile * * *.

"Other Insurance: If there is other automobile medical payments insurance against a loss covered * * * the company shall not be liable under this policy for a great-

er proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible automobile medical payments insurance; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible automobile medical payments insurance.

"Coverage D (1)—Comprehensive * * * (1) To pay for loss caused other than by collision to the owned automobile or to a non-owned automobile. For the purpose of this coverage * * * colliding with a bird or animal, shall not be deemed to be loss caused by collision. * * *

"Other Insurance: If the insured has other insurance against a loss covered by Part III of this policy (Comprehensive above) the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability of this policy bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance."

Both policies obviously provide coverage for the loss involved, but both policies purport to make their coverage "excess" under the situation involved. Both policies then literally construed, are excess; in the case of one policy because it was a "temporary substitute" automobile and in the other because it was a "non-owned" automobile.

The specific question before the court is whether, under such circumstances, one policy becomes the "primary" coverage and stands the entire loss or whether the "excess" coverages in both policies are mutually repugnant, and the carriers share the coverage and the loss. This issue is one of first impression here.

"Other insurance" clauses, where there are two or more automobile policies which may provide coverage

for a particular event, have received a great deal of judicial consideration. There are all sorts and varieties of such clauses which have sometimes been generally classified as "pro rata" clauses; "no liability" clauses; and "excess insurance" clauses. As indicated by the court in Oregon Auto Ins. Co. v. United States Fidelity & Guaranty Co., 195 F. 2d 958, judicial decisions attempting to determine which policy is primary and which is secondary in substantially identical disputes "point in all directions."

In 7 Am. Jur. 2d, Automobile Insurance, §§ 200 and 202, pp. 542 to 545, it is indicated that distinctions must be made and have been made in cases involving different types of "other insurance" clauses.

The conflict in interpretation between an "excess" insurance clause in one policy and the same or a similar "excess" insurance clause in another policy represent merely one segment of a very wide field of conflict of liability between liability carriers. See Annotation, 69 A. L. R. 2d 1122, and the cases there cited and discussed.

The appellee in this case endeavors to classify the State Farm coverage as to comprehensive liability in the same category as specific ownership coverage, and therefore "primary" since an "owned" automobile is defined as including a temporary substitute automobile. They argue that since Rodney Dobias was not within the definition of an insured under the State Farm policy as to comprehensive or collision, the State Farm coverage was on the car and not the driver. He was, however, within the definition of an insured within the medical payments coverage. The Union policy as to comprehensive coverage, however, extended to either an owned or nonowned vehicle, under the circumstances here. It is also argued that the Union policy is not "other collectible insurance" within the terms of the State Farm policy. These approaches attempt to give the restrictive clause of one policy prior or primary effect and rely upon somewhat circular reasoning in which one of two policies

affording coverage upon different hypotheses will be deemed "specific" and therefore "primary." The "excess" clauses in both of the policies involved here are almost identical. The automobile involved was not the "described" automobile in either of the policies. Although expressed in varying language, it seems to us clear that each company intended that if there were other insurance covering the loss, its coverage would be "excess." Both policies evidence the same intent with respect to insuring the risk and also with respect to avoiding liability in the event of adequate coverage by another carrier. If literal effect were given to the clauses in both policies, the result would be that neither policy covered the loss, and thus produce an unintended absurdity. It seems to us more important that each company in drafting its policy contemplated various types of situations which were likely to arise where the operation of a vehicle would probably be covered by other insurance.

We can find no reason to give absolute effect to a provision in one policy while ignoring a similar provision in the other. Both clauses in both policies in a situation such as this should occupy the same legal status.

The excess insurance provisions are mutually repugnant and as against each other are impossible of accomplishment. Each provision becomes inoperative in the same manner that such a provision is inoperative if there is no other insurance available. Therefore, the general coverage of each policy applies and each company is obligated to share in the loss. Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co., 28 N. J. 554, 147 A. 2d 529, 69 A. L. R. 2d 1115, and cases there cited. See, also, 7 Am. Jur. 2d, Automobile Insurance, § 202, p. 545; Annotation, 69 A. L. R. 2d 1122, et seq.

Where the coverage of one insurance company under an automobile insurance policy is "excess" insurance because the automobile involved in an accident was a "temporary substitute" automobile, and the coverage of an-

other insurance company is "excess" insurance because the same automobile was a "non-owned" automobile, and both policies otherwise provide coverage for the loss involved, the "excess" insurance provisions are mutually repugnant, the general coverage of each policy applies, and each company is obligated to share in the loss.

The problem of determining the method of prorating the loss is not directly presented here since there is no evidence as to the exact amount of coverage of each policy nor of the premiums paid, but only that each is more than sufficient. In any event, we conclude that where both companies stand on an equal footing, equity requires an equal apportionment of the loss.

For the reasons stated, the judgment of the trial court was in error, and the judgment is reversed and the cause remanded with instructions to enter judgment for the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM P. HOMAN, GUARDIAN AND NEXT FRIEND OF EUGENE J. HOMAN, INCOMPETENT, APPELLANT, V. LUCILLE HOMAN, APPELLEE.

147 N. W. 2d 630

Filed January 6, 1967. No. 36399.

1. **Marriage.** A marriage is presumed valid, and the burden of proof is upon the party seeking annulment.
2. ———. A marriage contract will not be declared void for mental incapacity to enter into it unless there existed at the time of the marriage such a want of understanding as to render the party incapable of assenting thereto.
3. ———. Mere weakness or imbecility of mind is not sufficient to void a contract of marriage unless there be such a mental defect as to prevent the party from comprehending the nature of the contract and from giving his free and intelligent consent to it.
4. ———. Absolute inability to contract, insanity, or idiocy will

void a marriage, but mere weakness of mind will not unless it produces a derangement sufficient to avoid all contracts by destroying the power to consent.

5. **———. A marriage is valid if the party has sufficient capacity to understand the nature of the contract and the obligations and responsibilities it creates.**

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Jack L. Spence, for appellant.

Martin A. Cannon, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BOSLAUGH, J.

This is an action to annul a marriage between Eugene J. Homan and Lucille Homan, the defendant. Although the action is brought by a guardian and next friend, Eugene J. Homan will be referred to as the plaintiff. The trial court found that the marriage was valid and dismissed the action. The guardian has appealed.

The petition alleged that the ward was mentally incompetent at the time of the marriage. By statute a marriage is void "when either party is insane or an idiot at the time of marriage, and the term idiot shall include all persons who from whatever cause are mentally incompetent to enter into the marriage relation." § 42-103, R. S. Supp., 1965.

A marriage contract will not be declared void for mental incapacity to enter into it unless there existed at the time of the marriage such a want of understanding as to render the party incapable of assenting thereto. Fischer v. Adams, 151 Neb. 512, 38 N. W. 2d 337. Mere weakness or imbecility of mind is not sufficient to void a contract of marriage unless there be such a mental defect as to prevent the party from comprehending the nature of the contract and from giving his fee and intelligent consent to it.

Absolute inability to contract, insanity, or idiocy will void a marriage, but mere weakness of mind will not unless it produces a derangement sufficient to avoid all contracts by destroying the power to consent. Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445; Adams v. Scott, 93 Neb. 537, 141 N. W. 148. A marriage is valid if the party has sufficient capacity to understand the nature of the contract and the obligations and responsibilities it creates. Fischer v. Adams, *supra;* Kutch v. Kutch, 88 Neb. 114, 129 N. W. 169.

The plaintiff has a history of mental illness and mental deficiency. When he was 5 years old he was ill with scarlet fever and encephalitis which resulted in a permanent impairment of his mental ability. In December 1950, the plaintiff was treated for schizophrenia. Treatment for this condition continued through 1958 but there is no evidence that the plaintiff received any treatment for this condition between 1958 and 1963. The plaintiff attended Immaculate Conception Grade School in Omaha, Nebraska, and completed 3 years of high school. He was then employed as a laborer by Goodwill Industries and later by Armour & Company.

The plaintiff first met the defendant in 1959. They commenced keeping company and approximately 3 months later the plaintiff proposed marriage. The marriage took place about 6 months later on February 27, 1960. The plaintiff was then 29 years of age.

During the courtship the plaintiff made plans to purchase a house and saved a part of his earnings for the downpayment. A property was selected, a mortgage negotiated, and the purchase completed. The parties moved into their first home a week after the ceremony. In March 1962, the parties traded this home for a larger property.

In 1963 the plaintiff was sent home from his employment with instructions to obtain medical treatment. The plaintiff consulted a physician, was referred to a psychiatrist, and was hospitalized.

At the time of the trial the plaintiff was on leave from the hospital. He was living with his parents in Omaha and working part time. The defendant last saw the plaintiff in August 1964. He was placed under guardianship in October 1964. The plaintiff did not attend the trial and, apparently, did not know of the action or the trial.

A marriage is presumed valid, and the burden of proof is upon the party seeking annulment. Adams v. Scott, *supra*. To succeed in this action it was necessary for the guardian to establish that the plaintiff was mentally incompetent on February 27, 1960.

The plaintiff suffers from a mental impairment that is the result of a childhood illness. This condition is permanent and existed at the time of the marriage. The guardian produced the testimony of the psychiatrist who had treated the plaintiff prior to the marriage. This witness testified that the plaintiff had a mental age of approximately 11 years; an intelligence quotient of between 69 and 75; and that the plaintiff would be classified as a high-grade moron. This witness further testified that, in his opinion, the plaintiff would have an inadequate or superficial understanding of the responsibilities of marriage.

The defendant testified at length concerning her acquaintance and relationship with the plaintiff from the time of their first meeting in 1959 until the hospitalization of the plaintiff in 1963. This evidence contradicts that of the guardian and tends to prove that the plaintiff had a sufficient understanding of the marriage relationship and its obligations and responsibilities. During this time the plaintiff was steadily employed as a maintenance and custodial worker, managed his finances, purchased two properties, and had a reasonably normal life. The evidence supports an inference that the marriage would have continued without difficulty if the plaintiff's mental illness had not recurred in 1963.

Although the plaintiff suffered from schizophrenia

prior to the marriage and again in 1963, the evidence shows that this illness was in remission at the time of the marriage and was not a disabling factor at that time. Although handicapped mentally, the plaintiff had sufficient ability to transact business and the capacity to enter into the marriage on February 27, 1960.

The marriage in this case may have been unwise or unfortunate, but it was not void. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRED DABNEY, APPELLANT.
147 N. W. 2d 768

Filed January 13, 1967. No. 36348.

1. **Constitutional Law: Criminal Law.** The failure of the district court to appoint legal counsel to perfect and conduct an appeal in a criminal action, without a request having been made therefor, is not a constitutional requisite to the affording of equal protection and due process of law as required by the Fourteenth Amendment to the Constitution of the United States and Article I, sections 1 and 3, Constitution of Nebraska.
2. **Criminal Law: Statutes.** The remedy under the Post Conviction Act is cumulative and is not intended to be concurrent with any other remedy. § 29-3003, R. S. Supp., 1965.
3. **Criminal Law.** The want of effective counsel is not measured alone by the result obtained and where, by the examination of the evidence and trial proceedings, and the statements of the defendant contained therein, it appears that the claim is not based on fact, the claim cannot be sustained.
4. ———. Where the finding of a small knife at the scene of an alleged crime has been admitted by the prosecution, the inability to produce it in evidence because it has become lost, is not ordinarily prejudicial to the rights of the defendant, particularly when its loss is explained.
5. **Constitutional Law: Criminal Law.** Where no controverted material issues of fact are presented, the facts as shown by the record are undisputed, the taking of oral testimony on the from the court's files and records, and the court is satisfied motion could not add to or detract from the information shown

that the prisoner is entitled to no relief, no evidentiary hearing is required under the provisions of the Post Conviction Act.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Michael T. Levy, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and POLLOCK, District Judge.

CARTER, J.

This is a proceeding under the Post Conviction Act. After the defendant, Fred Dabney, filed a motion to vacate the judgment of conviction, the trial court directed the county attorney to appear and show cause why an evidentiary hearing should not be held. On July 27, 1965, the county attorney appeared, evidence was taken, and on April 1, 1966, the motion to vacate the judgment was overruled and an evidentiary hearing denied. Defendant has appealed.

Defendant was arrested and charged with first degree murder. Preliminary hearing was waived. On July 12, 1961, the defendant having established indigency, the court appointed the public defender of Douglas County as his attorney. Defendant was tried before a jury and on October 12, 1961, he was found guilty of murder in the second degree. A motion for a new trial was filed and overruled. On January 23, 1962, defendant was sentenced to serve a sentence of 20 years in the State Penitentiary. Defendant discussed the matter of an appeal with his court-appointed counsel before sentence was imposed but admits he did not request that an appeal be taken but assumed that an appeal would be taken. Defendant asserts that he gave notice of appeal personally by letter to the clerk of the district court for Douglas County. There is nothing in the record indicating that a notice of appeal was filed. Defendant filed a

writ of habeas corpus in the district court for Lancaster County on April 24, 1962. The court determined that his petition did not state a cause of action and dismissed the action. An appeal was taken to the Supreme Court and this court dismissed the appeal on October 1, 1962, for failure to comply with the rules of the court. On June 5, 1963, defendant filed a petition for a writ of habeas corpus in the United States District Court for Nebraska. Counsel was appointed to represent him in that court and, after hearing, his petition was denied. He perfected an appeal to the United States Court of Appeals which remanded the case on the ground that defendant had failed to exhaust his state remedies. Defendant then filed a proceeding in the district court for Douglas County under the post conviction statute, Chapter 29, article 30, R. S. Supp., 1965. Counsel was appointed and relief denied as heretofore stated. An appeal was taken to this court, which appeal is presently before it. The primary issue before this court is whether or not the trial court erred in denying an evidentiary hearing and dismissing the motion to vacate the original judgment of conviction and sentence.

Defendant admits that many of the issues presented do not require an evidentiary hearing in the district court. It is his contention, however, that the files and records of the case do not conclusively show that defendant is not entitled to relief on three grounds: (1) That he was not afforded effective counsel, (2) that there was a suppression of evidence by the State, and (3) the failure to appoint counsel on the alleged appeal from the original conviction.

Defendant concedes that an evidentiary hearing is not required in all cases as this court has previously held in State v. Woods, 180 Neb. 282, 142 N. W. 2d 339. In that case we said: "Where no controverted material issues of fact are presented, the facts as shown by the record are undisputed, the taking of oral testimony on motion could not add to or detract from the information shown

by the court's files and records, and the court is satisfied that the prisoner is entitled to no relief, no hearing is required under the provisions of the Post Conviction Act."

Defendant complains of the failure of the court to appoint counsel on appeal from his original conviction. The evidence does not show and the defendant concedes that he did not request his counsel to appeal. He states that he assumed that an appeal would be taken. Within the time for taking an appeal, defendant discovered that no appeal had been taken. He asserts that he mailed a notice of appeal by letter to the clerk of the district court for Douglas County. The records disclose no such letter. The assertion by a defendant that he mailed a notice of appeal is not equivalent to the filing of a notice of appeal. When he uses the mail to deliver such a notice, he makes the postal department his agent for whose failure he is bound. In any event, if his allegations are true that he filed a notice of appeal, such appeal is pending and undisposed of. Without a denial of his right of appeal, he is not, under such circumstances, entitled to complain that his appeal was denied or that counsel was not appointed to represent him on appeal as this relief would still be open to him. No request was made to the court for the appointment of counsel to represent him on appeal. The court is not required to anticipate an appeal in every case as a defendant may be convicted of a lesser offense or receive a lenient sentence from which he may not desire to appeal. Defendant cites Douglas v. California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811, and Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A. L. R. 2d 733. In these cases a request for legal counsel in presenting an appeal on the ground of indigency was made and denied which is not the case here.

Here the defendant asserts that he gave notice of appeal. If this be true, defendant is precluded from invoking the Post Conviction Act. State v. Carr, *ante* p.

251, 147 N. W. 2d 619. If an appeal was not perfected and no request was made to the court for the assistance of counsel in perfecting or conducting it until after the time for appeal had expired, he had no right left to be protected and the appointment of counsel would be a useless act. The holdings of the cases cited do not extend to the case at bar. This is not a case involving waiver of counsel where the tender of counsel by the court is required. The rule to be applied here depends on the considered choice of the petitioner. Carnley v. Cochran, 369 U. S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70. The necessity for appointing counsel does not arise until he requests it from the court. In the instant case he made no request of his court-appointed attorney to appeal his case, he wrote letters to others having no authority to assist him, but he requested nothing of the court having authority to provide legal assistance. The appointment of counsel without request under the facts here shown is not a constitutional requisite independent of whether or not a request is made to the court.

Defendant asserts that ineffective and incompetent counsel was appointed to assist him in his original trial. He alleges that his court-appointed attorney did not confer with him until a few days before the trial and he reiterates the facts heretofore disclosed. He contends this entitles him to the relief demanded. At the hearing on the show cause order, the evidence taken at the original trial for first degree murder was received in evidence without objection and the evidence taken at the trial of the habeas corpus case in the United States District Court entitled Fred Dabney v. Maurice L. Sigler, Warden, Nebraska State Penitentiary, Civil 624 L, was received in evidence by stipulation of the parties. Defendant stipulated that if the witnesses called in the federal district court trial of the petition for habeas corpus were called in the instant case, their testimony would in effect be the same.

While it could be said that defendant was actually ac-

corded an evidentiary hearing in the hearing of the order to show cause, we will not so treat it in this case although he stipulated to the reception of extrinsic evidence.

We have examined the record of the trial of the defendant in the district court for Douglas County, including the evidence adduced therein, which resulted in a verdict of guilty of murder in the second degree. The record shows that defendant's attorney conducted the trial with professional skill and integrity. Objections and motions were timely made. The cross-examination of the State's witnesses was properly and skillfully done, and was undoubtedly the primary factor in bringing about the reduction of the charge to second degree murder by the prosecuting attorney. The claim that defendant's counsel did not take adequate time to prepare his defense has no foundation. No claim is made that any evidence existed that was not produced or properly presented. Defendant's claim that his court-appointed counsel was incompetent and ineffective rests solely in his dissatisfaction with the result of the jury verdict. This alone affords no basis for a claim of ineffective counsel.

Defendant claims that the State suppressed certain evidence which was prejudicial to his case. In this respect, the defendant testified at the original trial that the deceased drew a knife on him immediately before the shooting. There was evidence that a penknife with a short blade was found near the scene of the alleged crime which had a spot of blood on the handle. Witnesses for the State admitted the truth of this evidence. The prosecution failed to produce the knife at the trial for the reason that it had become lost during a move of the contents of the vault where such evidence was kept. The crime was charged as occurring on September 24, 1955, and defendant was not apprehended until about June 22, 1961. His trial in the district court was commenced on October 10, 1961. The delay in the trial was due primarily to the unknown whereabouts of the

defendant for more than 5 years. While it was the duty of the prosecution to retain evidence of this character, the explained loss of the knife removed any prejudice to the defendant under the circumstancs shown. It does not amount to a suppression of evidence by the State.

The records and evidence before the trial court show that defendant's assigned errors were without substance. Nothing could be shown at an evidentiary hearing that was not fully presented to the trial court on the order to show cause. The trial court's refusal to grant an evidentiary hearing was therefore correct and its judgment is affirmed.

AFFIRMED.

GUY FELLOWS, APPELLEE, V. BUFFALO COUNTY, A NEBRASKA CORPORATION, APPELLANT.
147 N. W. 2d 801

Filed January 13, 1967. No. 36357.

1. **Waters.** One who builds a structure in a watercourse is charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried therein, and what private proprietors may not do, neither may the public authorities, except in the exercise of eminent domain.
2. **Trial: Appeal and Error.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed as modified.

Andrew J. McMullen and John S. Mingus, for appellant.

Kenneth H. Dryden, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and POLLOCK, District Judge.

McCOWN, J.

This is an action for water damage to plaintiff's real and personal property. The damage was allegedly caused by failure of the defendant to provide sufficient drainage through a road fill constructed across a natural watercourse.

The jury returned a verdict for plaintiff for $1,400. After requiring remittitur of $371, the trial court entered judgment for the plaintiff for $1,029. The defendant county has appealed.

The plaintiff was the owner of 4 acres of property along Dry Creek, a tributary of Wood River. Dry Creek, in the area involved, was a small gorge with the winding bed of the creek approximately 30 feet below the level of the county road which crossed it. The plaintiff's blacksmith shop had been located for many years approximately 400 feet upstream from the road fill involved, and some distance from the bank of the creek. The level of the blacksmith shop was also approximately 30 feet above the creek bed. A bridge over Dry Creek was replaced about 1940 by the fill involved here which carried a two-lane county road. Before June 1965, the fill contained two circular culverts or flumes to permit the passage of water, one 5 feet in diameter and the other 42 inches. The 42-inch flume was placed in the fill sometime between 1951 and 1952, the 60-inch culvert having been there previously.

During all the years the blacksmith shop had been there, commencing before 1940 and continuing until June of 1965, there had been high water many times. Occasionally the water had reached the edge of the shop floor, but it had never gone into the shop. The fill had been washed out or partially washed out on many occasions. The heavy rainfall season ordinarily occurred in May, June, and July. In May of 1965, heavy rains and high water again occurred. The water again ran over the fill and washed out portions of it around both ends of the flumes or culverts. Again the water came close to

plaintiff's blacksmith shop, but did not get in. Following that occurrence, the defendant increased the height of the entire fill with a dirt and a loose gravel surface. The testimony as to the increased height varied from as much as 3 or 4 feet to "Two foot to the west and about six inches to the east." No additional flumes or culverts were installed. On June 27, 1965, there was again heavy rain and high water. On that occasion, the water went into the plaintiff's blacksmith shop to a depth of at least 16 inches above the floor according to defendant's witnesses, and 3 to 4 feet according to the plaintiff's witnesses, carrying silt and debris with it, and damaging the building and various items of personal property and equipment in it. The water remained in the shop and on the ground around it for more than 24 hours. When it receded, it left about a foot of mud or silt in the building and on the grade between the building and the driveway, together with litter and debris on the ground.

Some distance to the north and in the next section, a dam had been constructed in 1951 for irrigation and conservation purposes from which an overflow would place some water in the Dry Creek drainage basin which had formerly gone into another drainageway. The amount was described by the individual who constructed the dam as being "a measurable amount but not a great amount."

The defendant argues for the proposition that where a substantial amount of water from another source or sources has been added to the water for which the defendant is liable and the combined waters cause the damage, then it is incumbent on the plaintiff to establish either that his damage would have occurred from the waters for which the defendant is liable or to establish the amount of his damage that has been caused by the water for which the defendant is liable. Suffice it to say that the jury was specifically instructed to that effect and there is more than ample evidence to support the verdict, even if it be assumed that the defendant was not

liable for all waters carried by Dry Creek for 14 years.

One who builds a structure in a watercourse is charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried therein, and what private proprietors may not do, neither may the public authorities, except in the exercise of eminent domain. See, Baum v. County of Scotts Bluff, 172 Neb. 225, 109 N. W. 2d 295; Roe v. Howard County, 75 Neb. 448, 106 N. W. 587, 5 L. R. A. N. S. 831. There is no testimony here that the water involved was so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected. The court quite properly removed this issue from the jury.

The defendant asserts that the verdict is excessive, while the plaintiff asserts that no remittitur should be required. It is apparent that in requiring the remittitur, the court excluded evidence of temporary damage to real estate which could properly be considered by the jury. See Hunt v. Chicago, B. & Q. R.R. Co., 180 Neb. 375, 143 N. W. 2d 263. While indefinite in some respects, there was sufficient evidence to support the jury verdict.

Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. McKinney v. County of Cass, 180 Neb. 685, 144 N. W. 2d 416.

The judgment is modified by removal of the remittitur with directions to enter judgment on the jury's verdict, and as so modified is affirmed.

AFFIRMED AS MODIFIED.

JOHN DEERE COMPANY OF MOLINE, A CORPORATION, APPELLEE, V. RAMACCIOTTI EQUIPMENT CO., A CORPORATION, APPELLANT.

147 N. W. 2d 765

Filed January 13, 1967. No. 36365.

1. **Account Stated.** An account stated is an agreement between persons who have had previous dealings determining the amount due by reason of such transactions.
2. **Trial: Appeal and Error.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Webb, Kelley, Green & Byam, for appellant.

Marchetti & Samson, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and POLLOCK, District Judge.

BOSLAUGH, J.

This is an action upon an account stated brought by John Deere Company of Moline against Ramacciotti Equipment Co. The plaintiff distributes agricultural and industrial machinery. From 1959 to 1963 the defendant was the plaintiff's industrial dealer in Omaha, Nebraska.

The plaintiff alleged that the balance due on the account stated was $17,165.07 with interest. The defendant denied that an account stated existed between the parties and prayed for an accounting. The defendant also claimed damages for the breach of an alleged promise to find a purchaser for the defendant's business.

By stipulation the action was tried to the court without a jury. The trial court found generally for the plaintiff; that an account stated was rendered on January 27, 1964; that the amount due the plaintiff was $17,165.07 with interest; and that the defendant's counterclaim should

be dismissed. The defendant's motion for new trial was overruled and it has appealed.

The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong. Weiss v. Weiss, 179 Neb. 714, 140 N. W. 2d 15. This case turns on the question of whether the evidence is sufficient to support the finding of the trial court that an account stated existed between the parties.

An account stated is an agreement between persons who have had previous dealings determining the amount due by reason of such transactions. Hendrix v. Kirkpatrick, 48 Neb. 670, 67 N. W. 759. The failure to object to an account rendered is admissible in evidence as tending to prove an acknowledgment of its correctness. Proof of an express promise to pay is not required.

The transactions between the parties were governed by a written contract known as a General Industrial Dealer's Contract. The term of the last contract executed by the defendant expired on October 31, 1962, but the defendant continued in business after that date. The contract provided that it was applicable to goods ordered by the dealer subsequent to the expiration of its term unless the parties had entered into a new general dealer's contract.

The contract further provided that the plaintiff retained title to all goods delivered under the contract until full payment of the indebtedness arising under the contract was made. The defendant was required to pay the invoice price of all goods at the times "provided in the terms of payment established by the Company." Apparently, this required the defendant to pay for all items ordered as received except for "complete machines and attachments" held in inventory.

Each month the plaintiff furnished the defendant a summary statement of its account which listed the amount due for inventory and all other items. Apparently, it was customary for the parties to make a settle-

ment each month for the transactions that had occurred since the last previous settlement.

The defendant's account with the plaintiff became delinquent in May and June 1963 in that the defendant refused to pay for "net items and parts" that he had ordered. On July 10, 1963, the plaintiff's credit manager and the manager of its industrial sales division discussed the defendant's account with William S. Ramacciotti, the defendant's president, general manager, and sole stockholder. During that conference a printed form, denominated "Settlement," was filled in and signed by the plaintiff's credit manager and Ramacciotti. Listed on the form were lease payments due the plaintiff, warranty claims due the defendant, and the net balance due the plaintiff amounting to $17,108.17. During that conference, the plaintiff's credit manager requested payment of the account, but Ramacciotti stated, " 'I just don't have it.' "

On July 21, 1963, the defendant published a newspaper advertisement stating that it was "closing out" and that all new and used equipment would be sold at discounts of up to 50 percent. At this time the defendant was indebted to the plaintiff for inventory items in excess of $77,000.

On July 31, 1963, there was a conference at the plaintiff's office attended by Ramacciotti, his counsel, the plaintiff's manager, its counsel, and several other representatives. The plaintiff demanded repossession of the goods in the hands of the defendant for which the defendant was indebted to the plaintiff. The result of the conference was that the parties agreed to a peaceable repossession of the goods.

The removal of the goods from the defendant's place of business to the plaintiff's branch house in Omaha commenced on August 1, 1963. The contract provided that the plaintiff would repurchase parts which were "new, unused, in good condition" and "listed as returnable under the Company's parts return policy" at current

wholesale prices less a discount of 15 percent. A controversy developed over the pricing and handling of the goods, including parts which the defendant wanted to return for credit. This resulted in a temporary halt in the repossession. After further correspondence and conferences between the parties, the repossession was resumed and completed. The defendant closed its business and Ramacciotti engaged in a different business.

As a result of the various conferences and negotiations which took place between the parties, adjustments were made, credits were granted by the plaintiff, and the items in controversy were compromised and settled. As an example, the plaintiff reduced its discount on returned parts to 14 percent, allowed a further credit of $1,100 on eleven tractors, granted an additional credit of $1,954.28 on other machinery, and allowed $2,177.57 on warranty claims.

On January 23, 1964, there was a conference at the plaintiff's office attended by Ramacciotti, his accountant and counsel, the plaintiff's manager of its industrial sales division, its counsel, and other representatives. Prior to this conference a summary statement of the defendant's account as of November 25, 1963, had been furnished to the defendant's counsel. During the conference the plaintiff agreed to an additional credit of $450.47 which represented a refund with interest from the defendant's contingent earnings account. This credit was shown on the next summary statement of the defendant's account furnished to the defendant and dated January 27, 1964. A subsequent credit, granted July 22, 1964, from the contingent earnings account reduced the balance to $17,165.07.

The plaintiff's evidence established that the purpose of the conference on January 23, 1964, was to complete the final settlement between the parties by obtaining payment of the balance due. According to the plaintiff's witnesses there was no dispute as to the amount

due. The only problem remaining was the financial ability of the defendant to pay the balance due.

The defendant's evidence, primarily the testimony of Ramacciotti, tended to contradict that of the plaintiff, at least in part. At most, this presented an issue of fact for the trial court. As we view the record, the evidence was sufficient to sustain the finding of the trial court that an account stated existed between the parties on January 27, 1964. The amount due the plaintiff, after taking into effect the credit granted July 22, 1964, was $17,-165.07 with interest. Since there was an account stated as between the parties, the defendant had no right to a further accounting.

There was a failure of proof with respect to the defendant's claim that the plaintiff breached its promise to find a purchaser for the defendant's business. The counterclaim was properly dismissed.

The judgment of the district court is affirmed.

AFFIRMED.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLEES.

147 N. W. 2d 803

Filed January 13, 1967. No. 36368.

1. **Intoxicating Liquors.** The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in Chapter 53, R. R. S. 1943, is vested exclusively in the Nebraska Liquor Control Commission. § 53-116, R. R. S. 1943.
2. **Intoxicating Liquors: Municipal Corporations.** Section 53-147, R. R. S. 1943, not only contains a grant of power to cities and villages to regulate the business of beer licensees, but prescribes that the exercise of the authority granted be by ordinance, and the designated manner of the execution of the power is exclusive.
3. ———: ———. The purpose of section 53-129, R. R. S. 1943,

is to furnish a short procedure for a change of location in the business of a liquor licensee when neither the Nebraska Liquor Control Commission nor the municipality involved objects thereto and the section does not preclude an application for a new license at another location.

4. **Intoxicating Liquors.** The Nebraska Liquor Control Commission has a broad discretion in determining whether or not applications for the sale of liquor will be granted or denied, and the courts are without authority to interfere unless there is an abuse of that discretion.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Ralph D. Nelson, Vincent D. Brown, Arlyss E. Brown, and Jerry C. Nelson, for appellant.

Clarence A. H. Meyer, Attorney General, Robert R. Camp, Barney, Carter & Buchholz, and Frederick H. Wagener, for appellees.

Stewart, Calkins & Duxbury and David L. Crawford, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and POLLOCK, District Judge.

BROWER, J.

The appellees Henry Grenemeier and Mollie Grenemeier, doing business as Grenemeier's Liquor Store, filed an application before the appellee Nebraska Liquor Control Commission, hereinafter called the commission, for a package liquor store license to be located in the Meadowlane Shopping Center at 836 North Seventieth Street in Lincoln, Nebraska, and Grenemeier's Inc. filed an application with the commission for a retail license for a beer off sale establishment in the same center at 832 North Seventieth Street in said city. Both applications were as prescribed by section 53-131, R. R. S. 1943, and there is no contention that the applications were insufficient in form, nor the applicants unqualified to be licensed. The commission notified the City of Lincoln,

referred to hereafter as the City, for its recommendations. The City recommended both applications be denied. A hearing was had before the commission at which the two applications were consolidated for trial by consent of the parties. Thereafter the commission granted both applications, conditioned as therein provided that petitioners surrender licenses held by each of them at other locations in the city unless they shall have meantime expired.

From an order overruling its motion for a rehearing, the City appealed to the district court for Lancaster County. After a trial the district court found in favor of the commission and both applicants and affirmed the commission's order in all respects. The City has appealed to this court from an order denying a new trial.

The applicants will be designated as such where the opinion refers to them both and named where it is necessary to separately consider them.

The questions raised by the assignments of error necessary to this decision will be stated as they are discussed.

The City, in its brief, seems to contend that it has the power to regulate the location of all those holding the several kinds of liquor licenses although the error it assigns to the trial court's ruling in this respect is obscure. It contends this may be done under the police power of the city and that such regulations are valid if reasonable and not discriminatory or arbitrary. The case of Safeway Stores, Inc. v. Nebraska Liquor Control Commission, 179 Neb. 817, 140 N. W. 2d 668, is cited where this court held that the Legislature has plenary powers over the control and regulation of the manufacture, distribution, sale, and dispensing of alcoholic liquors. In that case, the Legislature itself was exercising the police power. It does not determine the issue before us. The City calls attention to a great many cases decided by this court upholding different restrictions placed on retail liquor establishments by municipalities prior to the enactment of the statute on liquor, Chapter 53, R. R. S. 1943. We

think those decisions arose under previous statutes by which the power to regulate such establishments was placed in the municipalities involved and have little application here. We need not consider them. At present the statute provides: "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in this act (Chapter 53), is hereby vested exclusively in the commission." § 53-116, R. R. S. 1943. The City calls attention to our recent decision in Allen v. Nebraska Liquor Control Commission, 179 Neb. 767, 140 N. W. 2d 413, claiming this court there held the city has general power to limit the number of liquor licenses issued in a city unless its action was arbitrary and unreasonable. A careful examination of that case does not warrant the interpretation placed on it by the City. In Allen, the city had limited by resolution the number of package liquor stores to 31 and because thereof had recommended the denial of the application to the commission. The commission concurred in the city's recommendation and denied the license. It was claimed the resolution limiting the number of licenses was not properly adopted and was arbitrary, and hence the commission should not have admitted it in evidence or considered it. The question of the admissibility of the city's resolution in evidence was there involved and presented on appeal to the district court and thereafter to this court. The case, however, makes plain that the action of the city was advisory only and the power of decision was in the commission. The opinion states: "In 1959 the Legislature for the first time required applications for liquor licenses to be filed with the Nebraska Liquor Control Commission rather than with local authorities. The legislation requires that notice be given to local authorities and that such authorities will have 30 days to make their recommendation. The City of Lincoln through its city council, recommended a denial of the application in the instant case. It is the commission, however, that

determines whether or not the application shall be granted or denied, the recommendation of local authorities under the act being advisory only. * * * In this case the question is whether or not the commission acted arbitrarily and unreasonably in denying the application on the recommendation of the city council of Lincoln. This in turn relates itself to the power of the city council of Lincoln to *recommend a denial* based on its action in limiting the number of package liquor licenses to 31." (Italics supplied.) This contention of the City has no merit.

The City maintains that in any event the Legislature has authorized it to regulate the business of all beer licensees. It calls attention to the fact that the applicant Grenemeier's Inc. was applying for an off sale beer license. The City cites section 53-147, R. R. S. 1943, which reads: "The governing bodies of cities and villages are hereby authorized to regulate by ordinance, not inconsistent with the provisions of this act, the business of all beer licenses carried on within their corporate limits." It claims the power so conferred extends to the regulation of the location, type of building, and number of licenses. It cites the case of Phelps Inc. v. City of Hastings, 152 Neb. 651, 42 N. W. 2d 300, where this court reversed the judgment of the district court in enjoining the enforcement of an ordinance of the city of Hastings which made it unlawful for any person or persons holding a license or licenses for the sale at retail of beer "on sale" and of alcoholic liquors other than beer in the original package, to sell, or keep for sale the same at retail, except in separate and distinct rooms or premises so separated by walls or partitions that access cannot be had directly from one to the other by means of doors or other openings. It was held the ordinance was proper under said section 53-147, R. R. S. 1943. It is unnecessary for us to determine whether or not the power of the City to regulate the businesses of beer licensees includes the power to regulate the location of the place of business

nor the extent of the power of the City in that respect. Section 53-147, R. R. S. 1943, not only contains a grant of power to cities and villages to regulate the business of beer licensees, but prescribes that the exercise of the authority granted be by ordinance, and the designated manner of the execution of the power is exclusive. Here there is no evidence that the City had enacted any ordinance containing regulations applicable to the question before us and no suggestion is made by the City that such an ordinance exists. The City's contention has no merit.

The City maintains the trial court erred in considering the applications as new ones purportedly prepared and filed as provided in section 53-131, R. R. S. 1943. The City calls attention to the record here which includes evidence that both applicants had previously sought transfer of the location of their respective businesses pursuant to section 53-129, R. R. S. 1943, which reads as follows: "Retail licenses issued hereunder apply only to the premises described in the application and in the license issued thereon, and only one location shall be so described in each license. After such license has been granted for particular premises, the commission, with the approval of the local governing body, and upon proper showing, may endorse upon the license permission to abandon the premises therein described and remove therefrom to other premises approved by him or it, but in order to obtain such approval the retail licensee shall file with the local governing body a request in writing, and a statement under oath which shall show that the premises to which removal is to be made comply in all respects with the requirements of this act. No such removal shall be made by any such licensee until his said license has been endorsed to that effect in writing both by the local governing body and by the commission."

The City contends that the trial court and this court should "pierce the form" of the action and prevent the applicants from accomplishing by indirection what they

failed to do directly under section 53-129, R. R. S. 1943. The City claims under this section the approval of the City is an absolute essential to change location by a licensee and the courts should not allow the section to be circumvented. The City has purported to fix the maximum number of liquor establishments at 58 although it is not shown whether the maximum number presently exist. The position of the City is not exactly clear. If it maintains no present licensee can change the location of its business without the City's consent because section 53-131, R. R. S. 1943, by its terms refers to those seeking "new licenses," it would appear to be seeking ironclad control over the locations of all present licensees. If it contends that the present applicants only are barred from seeking new licenses because of their previous application under secton 53-129, R. R. S. 1943, it seeks such control over them alone. The applicants have been in their present businesses for several years and the City makes no complaint as to the character of the licensees or the conduct of their business in the past. It seems natural that successful operators would first attempt to secure a change of location under section 53-129, R. R. S. 1943, without the expense attending an extended application, notice, and hearing required under section 53-131, R. R. S. 1943. The interpretation desired by the City would result in these applicants alone of all persons being precluded from making new applications with respect to relocating their place of business because of an attempt to do so in accordance with the express provisions of statute. An examination of the provisions of the liquor law, Chapter 53, R. R. S. 1943, shows the general intent of the Legislature was to grant the power to make decisions to the commission except as specifically otherwise authorized. Section 53-129, R. R. S. 1943, itself provides that the commission with the approval of the local governing body on proper showing may endorse permission to the licensee to abandon the old and remove to the new location. Although the City's consent is

necessary under that section the commission is to act if the consent is given. Under section 53-129, R. R. S. 1943, there is no requirement of notice or hearing. Only a showing that the new premises meet the requirements of the act is necessary. Section 53-1,115, R. S. Supp., 1965, provides for an appeal to the commission from any order or action of the local governing body of a city revoking or refusing to revoke a license. Section 53-1,116, subsection (5), R. R. S. 1943, provides that any decision of the commission granting or refusing to revoke a license or permit for the sale of alcoholic liquors including beer may on appeal be reversed, vacated, or modified by the district court for Lancaster County. In neither instance is an appeal provided from an order granting or refusing a transfer of location as provided in section 53-129, R. R. S. 1943. Where no notice or hearing is required the general appeal provision, sections 84-913 to 84-917, R. R. S. 1943, would also appear inapplicable. Without a hearing an error proceeding would seem unavailing. The statute in all other cases provides for an appeal. The applicants and the commission as appellees urge the proper interpretation of the purpose of section 53-129, R. R. S. 1943, is to furnish a short procedure for a change of location in the business of a liquor licensee when neither the commission nor the municipality objects thereto and the section does not preclude an application for a new license at another location. The lack of a provision for notice or hearing in section 53-129, R. R. S. 1943, the absence of a provision for an appeal which is provided in all other cases, and the apparent general purpose of the liquor statute to give the commission discretion in all other cases compel us to the same conclusion. The contention of the City is without merit.

The City maintains the trial court erred in affirming the commission's order in granting the applicants' licenses at locations in the Meadowlane Shopping Center over the City's objections and contends the commission's

order was arbitrary and capricious. The policy resolution of the City limits the number of beer licenses to 58 of which only 40 could be licensed for consumption on the premises. It permits 31 package liquor outlets. It describes each area in which the different types of liquor establishments might be licensed. The resolution itself does not, however, purport to set forth the underlying policy of the city nor the basis or reasons for the restriction of locations set forth. It was unrelated to present zoning.

Members of a committee of the council which had the liquor policy of the city under consideration before certain changes were adopted in the policy resolution testified as to the reasons underlying the liquor policy as the witnesses understood them. There was testimony that the original policy adopted in 1954 had permitted liquor outlets only in areas covered by the police foot patrol. The witnesses said the committee felt the policy should be updated. It considered the effect on residential properties as well as differences in policing certain areas as to holdups and as to sales to minors. The members concluded that liquor outlets should not be permitted in all areas where business was permitted, but should be restricted to the main commercial center referred to as the "regional area" and other much smaller areas referred to as "major commercial centers." The "major commercial centers" were suggested by certain data in the office of the planning department. The data referred to the future development more than present conditions. These centers were shown on exhibit 21 as prepared by the planning department. That department had projected to the year 1980 the growth of these "major commercial centers" and estimated at that future time each would draw trade from an area within 2 miles of the center. This was estimated from traffic computers presently placed at certain intersections. There were six of such "major commercial centers" and in four liquor outlets were allowed but not in the other two.

The two areas were excepted because of the proximity to student bodies attending a college and a university. These young people, it was said, would create a problem of enforcement although the members had never investigated whether this had occurred in the "regional area" close to the University of Nebraska. At times, licenses had been granted by the council without regard to the existing policy resolution which was amended thereafter. Councilmen had always felt free to vote to issue licenses in other areas prior to changing the policy resolution. Other licenses existed outside of the prescribed areas. When areas were annexed containing outlets they were allowed to continue as long as they remained under the same ownership although the policy resolution remained unchanged.

The Meadowlane Shopping Center to which the applicants desired to move their location was not one of these "major commercial centers." It however was compared to the Indian Hills Shopping Center designated on exhibit 21 as such a center. The witnesses testified the two shopping centers were quite similar except there was more room for future development because of vacant land to the west and south of the Indian Hills Center and it was thought it would expand to be such by 1980. The Meadowlane area was policed by cruiser cars and motorcycles in the same manner as many other commercial areas. It seems to have served the customers from as large a residential area as Indian Hills Center.

The Nebraska Liquor Control Commission had a broad discretion in determining whether or not application for licenses for the sale of liquor will be granted or denied, and the courts are without authority to interfere unless there is an abuse of that discretion. Allen v. Nebraska Liquor Control Commission, 179 Neb. 767, 140 N. W. 2d 413. Considering the evidence hitherto reviewed, we cannot say that the commission abused its discretion in finding that the liquor applications of the appellants should be granted and that their location in

the Meadowlane Shopping Center was presently justified.

It follows that the judgment of the district court affirming the action of the Nebraska Liquor Control Commission should be and is affirmed.

AFFIRMED.

MARY CARSON, APPELLEE, V. DOBSON BROS. CONSTRUCTION COMPANY, A NEBRASKA CORPORATION, APPELLANT.
147 N. W. 2d 797

Filed January 17, 1967. No. 36295.

1. **Highways.** It is the continuing duty of a contractor, engaged in construction work on a public highway, to erect barricades or signs, or otherwise adequately warn the traveling public that the highway is dangerous to travel.
2. **Municipal Corporations: Negligence.** When a traveler on a public street is warned by proper devices or barricades of an obstruction or excavation and he voluntarily elects to continue, without knowledge of the conditions existing around the obstruction or excavation, thus placing himself in a position of danger, such conduct constitutes contributory negligence as a matter of law sufficient to bar recovery.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and dismissed.

Cline, Williams, Wright, Johnson, Oldfather & Thompson and Fredric H. Kauffman, for appellant.

Merril R. Reller and Donald R. Hays, for appellee.

Heard before WHITE, C. J., BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and C. THOMAS WHITE, District Judge.

WHITE, District Judge.

The plaintiff, Mary Carson, brought suit against Dobson Bros. Construction Company, a Nebraska corporation, for damages on account of personal injuries sustained in a fall into an excavation. The trial resulted in a verdict for the plaintiff of $4,250. Motion for judg-

ment notwithstanding the verdict or for new trial was overruled, and defendant appeals.

The evidence discloses that plaintiff, a housewife and resident of Lincoln, Nebraska, arose prior to 3:30 a.m. on April 19, 1964, to assist her daughters, ages 12 and 14, in the delivery of the Sunday World-Herald newspapers. The plaintiff had done so for a period of about 1 year. Her help consisted of driving her car only. It was a dark night, raining, and foggy. For the purpose of acquainting Mr. Elmer Meyers with the route so that he could deliver the papers when plaintiff and her daughters were out of town, the plaintiff drove her car onto Twelfth Street in Lincoln. Twelfth Street, at the area in question, is a graveled street running north and south. There are no sidewalks along Twelfth Street in the area. The plaintiff approached the Meyers' home from the south and stopped her car south of an alley immediately in front of a large pile of dirt in the roadway. The Meyers' home was north of the alley between Saunders and Dawes Avenues and on the east side of Twelfth Street. The plaintiff left the lights burning on her car, got out, and walked to her right in a northerly direction. There were no lights in the immediate area other than the car lights. The plaintiff followed what she termed a pathway beyond a bush and observed earth ahead of her. She then suddenly slipped or fell into an excavation, suffering injuries. She was able to get out of the ditch and, although confused, went to the Meyers' home where some dirt was washed off her. She was then assisted back over the ditch by Mr. Meyers and driven in her car by Mr. Meyers to her home. Some time later, she was taken to the Lincoln General Hospital where she received medical treatment. The plaintiff testified that she did not know of the existence of the ditch until she fell in, but later discovered that she was walking over a culvert which crossed the ditch and which was covered at the top with earth approximately the level of the earth on either side of the ditch.

Elmer A. Meyers, a witness for the plaintiff, testified that he lived at 2340 North Twelfth Street in Lincoln on April 19, 1964; that his home was west of Fourteenth Street and north of Oak Creek on the east side of Twelfth Street; that his home was on the north side of an alley; that on April 17 or 18, 1964, the defendant dug a ditch for the purpose of laying a telephone cable across Twelfth Street in an east-west direction; that the ditch was deeper than the height of an average man; that the dirt from the ditch was piled on the south side of the ditch in the middle of Twelfth Street; that Twelfth Street is a graveled road; that on the east side of Twelfth Street there was a pathway across the ditch; that there was no light or barricade placed in the pathway; that a culvert crossed the ditch at a right angle in the middle of the pathway; that dirt covered the culvert; and that this condition existed in the morning hours of April 19, 1964. Exhibit 1, a photograph, shows a view of the route plaintiff walked, and discloses the entire area covered with fresh earth, with evidence of foot travel approaching the ditch and the culvert, with fresh earth partially covering the top at the level of the surrounding ground. Exhibit 2, another photograph, shows a view of the ditch and culvert, indicating a tunneling under the culvert. The witness testified that the conditions shown in the exhibits correctly reflected the situation at the time of the incident in question. He testified that, before he assisted plaintiff to her car, he laid a door across the ditch to enable her to cross it.

On cross-examination, Meyers testified that the construction work on Twelfth Street had started a week before plaintiff's accident; that he recalled barricades and that one was placed in front of the dirt pile in Twelfth Street; and that he saw no other barricades.

Arnold Boettcher testified that he is an employee of the safety division, State of Nebraska, concerned with employee safety; that he inspected the site of the injury on April 20, 1964; that he saw no railing, lights, or

barricade at the footpath; that he observed a door that had been used for walking across a ditch; and that he saw no sidewalks in the area.

Arnold Campbell testified that he lived at 2346 W Street and that he was a construction worker; that he visited the area in question about 8:30 a.m. on April 19, 1964; that he observed Twelfth Street, the ditch, a pathway, a metal corrugated culvert across the ditch with dirt on the top of it, but observed no barricades or warning signs along the pathway; and that there were no men or equipment working at the site when he observed it.

The defendant's first assignment of error relates to the trial court's failure to sustain the defendant's motion for a directed verdict, made at the close of plaintiff's case. The defendant asserts that plaintiff failed to prove the defendant negligent, and failed to prove that the negligence of the defendant, if any, was the proximate cause of plaintiff's accident and injuries, that the evidence showed that the plaintiff was guilty of contributory negligence as a matter of law, and that plaintiff voluntarily assumed the risk.

The duty to maintain streets and sidewalks in a reasonably safe condition for travel it remitted during the time occupied in making repairs. Conklin v. Lincoln Traction Co., 130 Neb. 28, 263 N. W. 674.

The defendant was an independent contractor engaged in the installation of an underground telephone cable. The plaintiff does not question defendant's right to excavate in the area nor its right to suspend travel across Twelfth Street.

There is no evidence tending to show that the excavation was constructed in an irregular manner nor that the purpose for which the excavation was made was not reasonable. The plaintiff does assert that the ditch was allowed to remain open an unreasonable length of time. The evidence indicates that the excavation on Twelfth Street was begun on or before April 17 or 18, 1964, and plaintiff's accident happened in the early morning hours

of April 19, 1964. No evidence was adduced that the work was not diligently pursued, nor that the work was completed prior to April 19, 1964, so that the ditch could have been filled. Fresh cement was laid in the bottom of the ditch on April 18, 1964.

The plaintiff further contended in the lower court that the negligence of the defendant consisted of leaving the ditch open and exposed across an area where people were accustomed to walk, and in failing to warn travelers of the ditch or erecting a suitable barricade.

The plaintiff does not assert, nor have we discovered, any duty by which the defendant was required to furnish a pathway across the open ditch to the public. The crux of plaintiff's case is to the point that the defendant had knowledge that the general public was using the area on the east side of Twelfth Street across the culvert as a pathway, that the condition was dangerous, and that the defendant failed to warn the public of such danger by the erection of a suitable barricade and lights. Plaintiff introduced no evidence showing the use of the pathway by the public. Defendant's evidence was to the effect that the footprints were made by workmen.

It is the continuing duty of a contractor, engaged in construction work on a public highway, to erect barricades or signs, or otherwise adequately warn the traveling public if the highway is dangerous to travel. Bruno v. Gunnison Contractors, Inc., 176 Neb. 462, 126 N. W. 2d 477.

That the defendant placed a barricade in Twelfth Street to warn travelers is not disputed. There were no sidewalks across which to place a barricade. The plaintiff stopped her car at the barricade and saw the large pile of earth on Twelfth Street. She was apprised that travel in the highway was dangerous. In spite of this warning, she walked onto a poorly lighted pathway in an area where no sidewalk existed, at night, with no knowledge of the condition of the pathway. Thereupon, she stepped onto the culvert which crossed the ditch, fell,

and was injured. The evidence discloses that plaintiff could have approached the Meyers' house from the north without exposing herself to any hazards.

The plaintiff relies on Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682. There, the plaintiff, a guest passenger, sued the defendant construction company for personal injuries alleged to have been caused when the car in which she was riding collided with a pile of gravel which the defendant caused to be placed on the highway, without warning of the obstruction or barricading the obstruction. The court held that failure to warn the traveling public that the highway was dangerous to travel, or of obstructions, is continuing negligence as distinguished from a condition. In the instant case, the plaintiff, after having observed a barricade and taken note of the dangerous condition, proceeded into the area of danger. The case is distinguishable on the facts.

The plaintiff also cites King v. Douglas County, 114 Neb. 477, 208 N. W. 120, in which the evidence discloses that during the construction of the Lincoln Highway near Elkhorn, Nebraska, the county maintained a by-pass road. It was established that no barricades or signs were erected to warn the drivers using the by-pass of its dangerous condition or that the road was closed, and that plaintiff's intestate was directed by defendant contractor's employees to use the by-pass. The plaintiff's intestate was killed in an accident thereon. The court held that the county was liable by reason of the unsafe condition of the by-pass.

The plaintiff also relies on Simonsen v. Torin, 120 Neb. 684, 234 N. W. 628, 81 A. L. R. 1000, a case in which the defendants, without fault in the operation of a truck, struck a trolley pole and knocked it into the street, obstructing the street. The plaintiff, a passenger in a car, brought suit for personal injuries sustained when the car in which she was riding collided with the pole in the street. The court held that the negligence of the defendants consisted not in having placed an obstruction in a

public highway but in failing to either remove the obstruction or to warn the traffic on the highway of the dangers incident to the obstruction. The cases are distinguishable on their respective facts.

Plaintiff further relies on Village of Ponca v. Crawford, 23 Neb. 662, 37 N. W. 609, 8 Am. S. R. 144, and City of Beatrice v. Forbes, 74 Neb. 125, 103 N. W. 1069, for the proposition that contributory negligence, as a matter of law, is not imputed to a traveler from the mere fact that he attempts to pass over a street that is obstructed or out of repair, provided that the obstruction or other defect is such that a man of ordinary intelligence would reasonably believe that, with proper caution and care, he could pass with safety notwithstanding the defect. In each of these cases, the condition was discovered and known. In the instant case, the plaintiff, with warning of danger and without knowledge of the condition of the path, disregarded both warning and lack of knowledge.

The obligation of the defendant was to warn the traveling public of obstructions in the highway. The plaintiff, by her own acts, placed herself in a position where injury could reasonably be expected to occur, after disregarding a warning of danger.

We do not say that the defendant, or other persons similarly situated, is relieved from the duty of warning the public of a dangerous crossing of an excavation where evidence is introduced showing or tending to show that the path was used by the public with actual knowledge by the defendant, or under circumstances tending to show that the use by the public should have been known to the defendant.

We conclude that the plaintiff was contributorily negligent as a matter of law, that such negligence was more than slight, and that the trial court erred in failing to dismiss the plaintiff's petition.

The defendant raises other assignments of error, but it is not necessary to discuss them.

REVERSED AND DISMISSED.

LARRY J. HEYWOOD, APPELLEE, V. HOMER BRAINARD, SHERIFF OF DODGE COUNTY, NEBRASKA, APPELLANT.
147 N. W. 2d 772

Filed January 17, 1967. No. 36384.

1. **Constitutional Law: Statutes.** It is the duty of this court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done.
2. **Statutes.** The word "otherwise" is defined as follows: "In a different manner; in another way, or in other ways."
3. ———. In construing a statute, effect must be given if possible to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
4. **Constitutional Law: Statutes.** It is a fundamental requirement of due process of law that a statute be reasonably clear and definite.
5. **Criminal Law.** The basic requirement for certainty of a criminal statute demands that it give persons of ordinary intelligence reasonable notice as to what conduct is forbidden by the statute and not require them to speculate on its meaning.
6. **Constitutional Law: Statutes.** Section 60-430.02, R. S. Supp., 1965, held unconstitutional.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Richard L. Kuhlman, for appellant.

Kerrigan, Line & Martin, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and HASTINGS, District Judge.

SPENCER, J.

This is an appeal from an order in a habeas corpus action releasing the petitioner from custody and determining that section 60-430.02, R. S. Supp., 1965, is unconstitutional.

Petitioner was held in custody by Homer Brainard, sheriff of Dodge County, on a complaint which alleged in part as follows: "* * * Larry J. Heywood, on or about the 23rd day of April, A. D. 1966, in the County of Dodge, and State of Nebraska, then and there being, was then

and there the person operating a motor vehicle in violation of the State Motor Vehicle laws and did unlawfully flee in an effort to avoid arrest for violating a law of the State of Nebraska, * * *."

After a hearing, the district court determined that section 60-430.02, R. S. Supp., 1965, under which petitioner was charged, was unconstitutional, and ordered petitioner released from custody.

Section 60-430.02, R. S. Supp., 1965, including the catch line, is as follows: "License; operating motor vehicle in violation of law; flight to avoid arrest; violations; penalty; order not to operate motor vehicle. It shall be unlawful for any person operating any motor vehicle to flee in such vehicle in an effort to avoid arrest for violating any law of this state. Operation of such motor vehicle in an otherwise lawful manner shall not constitute fleeing to avoid arrest. Any person violating the provisions of this section shall, upon conviction thereof, be (1) fined in a sum not exceeding five hundred dollars, or (2) imprisoned in the county jail for not to exceed six months, or (3) imprisoned in the Nebraska Penal and Correctional Complex for a period not less than one year nor more than three years, or (4) punished by both such fine and imprisonment. The court shall, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any purpose for a period of one year from the date of his release from imprisonment, or in the case of a fine only, for a period of one year from the date of satisfaction of the fine."

The statute makes it unlawful for the operator of a motor vehicle to flee in the vehicle in an effort to avoid arrest for violating *any* law of this state. It then states that operation of such vehicle in an *otherwise lawful manner* shall not constitute fleeing to avoid arrest. This is the wording which raises the question herein. What is mean by "operation * * * in an otherwise lawful manner"?

It is the duty of this court to give a statute an inter-

pretation which meets constitutional requirements if it can reasonably be done. Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240.

The word "otherwise" is defined in both Webster's New International Dictionary (2d Ed.), p. 1729, and Black's Law Dictionary (4th Ed.), p. 1253, as follows: "In a different manner; in another way, or in other ways."

In construing a statute, effect must be given if possible to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. Rose v. Hooper, 175 Neb. 645, 122 N. W. 2d 753.

Does the statute mean that the operator fleeing to avoid arrest must have violated some traffic regulation such as speeding or running a stop sign or some similar violation previous to the pursuit? The Revisor of Statutes may have placed this interpretation on it in the catch line phrase "operating motor vehicle in violation of law." This may be a plausible interpretation, but the statute does not appear to be so restricted. The statute says "for violating any law of this state." It does not say for violating a law while operating a motor vehicle. Does the statute mean that if a law has been violated and the operator in fleeing from arrest does not violate any traffic regulation, the statute does not apply? This might raise a question as to whether it is possible to operate a vehicle in a lawful manner while fleeing to avoid arrest. There are many other questions that might be raised as to the meaning of the statute, but these are sufficient to point up the problem.

The State interprets the language to mean that it is necessary for it to prove that the operator of the vehicle had: (1) Violated a law of this state; (2) was fleeing in the vehicle to avoid arrest for the violation; and (3) while he was fleeing to avoid arrest, he was further violating another law. What would be the result if the operator subsequently secured an acquittal of the viola-

tion for which his arrest was originally sought?

It is a fundamental requirement of due process of law that a statute be reasonably clear and definite. State v. Adams, 180 Neb. 542, 143 N. W. 2d 920. The basic requirement for certainty of a criminal statute demands that it give persons of ordinary intelligence reasonable notice as to what conduct is forbidden by the statute and not require them to speculate on its meaning. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. See State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678.

We conclude that the phrase "Operation of such motor vehicle in an otherwise lawful manner shall not constitute fleeing to avoid arrest" makes section 60-430.02, R. S. Supp., 1965, vague and uncertain and requires men of ordinary intelligence to speculate on its meaning.

For the reasons given, we affirm the judgment of the trial court.

AFFIRMED.

WHITE, C. J., dissenting.

The constitutional issue raised in this case arises from an alleged ambiguity in the second sentence of section 60-430.02, R. S. Supp., 1965. Although interpretation in its general sense is necessary, the standard of guilt is reasonably ascertainable. Nothing in the statutory language leaves the outcome of a trial to the moral temper of an unguided jury. An essential element of the crime is culpable intent, and the statute has given fair warning of the prescribed conduct. Constitutions do not demand of Legislatures a definiteness that obviates interpretation. I think there is no constitutional uncertainty involved here, and I therefore dissent.

In the interpretation of a statute, the court should ascertain the legislative intent and give effect to it if it

is a lawful one. Wilson v. Marsh, 162 Neb. 237, 75 N. W. 2d 723. To construe a statute, a court must look to the object to be accomplished, the evils and mischief sought to be remedied, or purpose to be subserved, and place on the statute a reasonable or liberal construction which will best effect its purpose, rather than one which will defeat it. Roy v. Bladen School Dist., 165 Neb. 170, 84 N. W. 2d 119; Rebman v. School Dist. No. 1, 178 Neb. 313, 133 N. W. 2d 384.

In the case before us, the intent of the Legislature is plainly manifested in the first sentence of the act, to wit: "It shall be unlawful for any person operating any motor vehicle to flee in such vehicle in an effort to avoid arrest for violating any law of this state." The second sentence: "Operation of such motor vehicle in an otherwise lawful manner shall not constitute fleeing to avoid arrest" was intended merely to define that which was not an offense under the statute. It in no way changes the definitions of the crime charged in the first sentence and is needless surplusage. .

The foregoing is not only apparent from the act itself, but is supported by the legislative intent as expressed in the report of the Legislative Judiciary Committee wherein it is said: "The statute presently makes fleeing to avoid arrest a crime only if done as an effort to avoid arrest for operating a vehicle while the operator's license has been suspended or revoked. This bill includes anyone fleeing to avoid arrest."

It is not the court's duty, nor is it within its province, to read a meaning into a statute that is not warranted by the legislative language. Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476. If a statute is unambiguous, courts will not by interpretation or construction usurp the function of a lawmaking body and give it a meaning not intended or expressed by the Legislature. Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240. Rules of interpretation are resorted to for purpose of resolving an ambiguity in a statute, not of creating it. State ex rel.

Finigan v. Norfolk Live Stock Sales Co., Inc., 178 Neb. 87, 132 N. W. 2d 302. A cardinal rule of statutory construction is that effect must be given, if possible, to the whole statute and every part thereof, and it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. An interpretation which gives effect to a statute will be chosen over one which defeats it, and an interpretation which gives effect to the entire language will be selected against one which does not. Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205, 62 A. L. R. 2d 1295.

In the case before us, the crime is properly defined in its first sentence of the statute. The ambiguity, if any, is contained in the second sentence, a needless provision. It is not the province of this court to create an ambiguity by construction or inference for the purpose of holding the statute unconstitutional. The Constitution does not require the Legislature to anticipate that the court will by inference or speculation create an ambiguity when the intention of the Legislature is clearly evident.

SMITH, J., dissenting.

In my opinion the statute is somewhat ambiguous but not unconstitutionally uncertain. I therefore dissent.

MARY R. CUNNINGHAM ET AL., APPELLANTS AND CROSS-APPELLEES, V. OTHO L. STICE ET AL., APPELLEES AND CROSS-APPELLANTS, THOMAS BURTON ET AL., APPELLEES AND CROSS-APPELLEES.

147 N. W. 2d 921

Filed January 27, 1967. No. 36371.

1. **Adverse Possession.** The claim of title by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.

2. ———. The possession is sufficient if the land is used continuously for 10 years for the purpose for which it was adapted by its nature and character.
3. **Boundaries: Adverse Possession.** Where one, by mistake as to the boundary line, constructs a fence and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.

Appeal from the district court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Bayard T. Clark and Herman Ginsburg, for appellants.

Archibald J. Weaver, for appellees Stice et al.

Wiltse, Wiltse & Lantzy, for appellees Burton et al.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and LYNCH, District Judge.

CARTER, J.

The plaintiffs brought this action to determine the north line of their property which they contend is the south quarter line of Sections 4 and 5, Township 1 North, Range 18 East of the 6th P.M., in Richardson County, Nebraska. The defendants Stice are the owners of the land immediately north of plaintiffs' lands in Section 4 and the defendants Burton are the owners of the land immediately north of plaintiffs' lands in Section 5. The issue in the case is the location of the common boundary line between the plaintiffs on the one hand and the defendants Stice and Burton on the other. The plaintiffs contend that the boundary line is the south quarter line in Sections 4 and 5 according to the United States government survey as shown by exhibit 3 in the record. The defendants contend that the boundary line is the south quarter line in Sections 4 and 5 according to the Relf survey as determined and filed in the county surveyor's office in Richardson County on May 21, 1913. The trial court found that the fence constructed by S. W. Cunning-

ham on the line of the Relf survey was the correct line under the evidence and it quieted the title to the lands of the respective parties north and south of the fence constructed on the Relf survey line.

The plaintiffs are the daughters of S. W. Cunningham from whom they inherited the lands to which they now assert ownership. In 1913, S. W. Cunningham caused J. Frank Relf to make a survey for the purpose of establishing the north line of his land. Thereafter he established a fence on the line established by Relf. In 1958, a new fence was built by the defendant landowners on the approximate line of the old fence. In January 1965, plaintiffs employed Willis L. Brown to make a survey establishing the north line of their lands. In so doing, he found original corners and established the line in accordance with the original government survey which is some distance north of the fence erected on the line established by Relf. It is the land between the lines established by Brown and Relf that is in dispute in this litigation.

The point of beginning of both surveys was the south quarter corner on the west line of Section 5. From this point east, the first half mile is described as high ground farmlands. The land then drops down over the Missouri River bluffs to bottom lands which extend to the west bank of the present location of the Missouri River. These bottom lands were covered with timber and brush until some clearing thereof has been done in recent years. In 1938, the course of the Missouri River was changed by the U. S. Army Corps of Engineers so that it now runs approximately along the east line of Section 5, the Burton land lying immediately to the west thereof. The Stice land lies to the east of the Missouri River and extends to the chute where the Missouri River formerly ran. The Stice land is bottom land as hereinbefore described.

Frank Norris, the county surveyor of Richardson County, completed a retracing of the Relf survey which

was completed the day before the commencement of the trial. The records of his office do not show a survey plat. His retracement was based on Relf's field notes on file in the office. In making the retracement survey, no stakes were found, but two limestone corner markers were found which he assumed were set by Relf in his 1913 survey. Norris testified that he accepted the two limestone markers and projected the line east across the present channel of the Missouri River to the old chute of the Missouri River. The evidence of old fences were found on the ground which were south of his line. Norris states that the fence on the Burton land for a distance of 600 to 800 feet was 7 feet south of the south quarter line which he reestablished, at which point it became contiguous with the survey line. A quarter of a mile east of the west line of Section 5, the fence was about 2 feet south of the surveyed line. In going on east down the hill the survey line was followed but at the base of the hill the corner was 6 feet south. The conclusion of Norris is that the new fence is "pretty much" on the east and west line of the Relf surveyed line.

It is evident that the Relf survey does not coincide with the survey of Brown based on the government corners which he found. The reason for the difference is not too important under the circumstances of this case. The evidence shows that S. W. Cunningham caused the Relf survey to be made about 1913 for the purpose of determining the line on which to build the original line fence. He built the fence on the line so established and the parties have treated it as the south quarter line in Sections 4 and 5 since and until the present litigation arose. S. W. Cunningham kept this fence in repair until 1950, after which it was allowed to deteriorate.

There is evidence in the record regarding the location of a well on Section 5 and its distance from the original fence. Plaintiffs and others testify that the well was about 35 feet north of the original fence line. The evidence shows that it is now about 90 feet north of the

new fence built on the line of the old one. There is evidence by a former owner that he moved this well 15 or 20 feet north in order to obtain an adequate supply of water. While this evidence does not account for the difference of 40 feet in the estimated distance, it raises a question of credibility which the trial court was in the better position to determine.

The Burton land was owned by Richard Majerus from 1950 to 1959. He found the original fence along the south boundary. Majerus sold the land to Joseph Strecker in 1959. Strecker established the original south fence as a boundary at the time of his purchase. He did not repair the fence during his ownership of the land nor was it moved up to the time he sold the land to Burton. Burton rebuilt the fence in the winter of 1964-1965 on the line or a little north of the line of the old fence.

The Stice land was bottom land lying between the Missouri River as it was located after 1938 and its old riverbed. It was inaccessible except by boat for many years and until the old riverbed filled in. He claims beyond the line of the old fence, much of which was washed out in the flood of 1952. Stice began clearing the land after his purchase of it and built a new fence south of the line of the Relf survey as retraced by Norris.

Plaintiffs testify that the fence began at the south quarter corner in the west line of Section 5 and went straight east to the Missouri River, which line was 35 feet south of the well previously described. The evidence shows that S. W. Cunningham caused Relf to survey his north line for the very purpose of determining where to build his north line fence. He built his fence on that line and for more than 50 years it was generally considered as the boundary between the lands of plaintiffs and defendants. The evidence of old fencing on the line of the Relf survey sustains a finding that the new fence was substantially on the line of the Relf survey. There is evidence of occupancy and use of the lands by the parties to the old fence, although the evidence of physi-

cal use is fragmentary due to the nature of the land. But it seems important in a consideration of the case that plaintiffs' father, S. W. Cunningham, caused the Relf survey to be made, that he built and maintained a fence thereon for many years, and that all parties to the litigation considered the Relf survey line to be the boundary line except the plaintiffs who claim under the original government survey. With the establishment of the Relf survey line and the evidence of the building of the original and new fences on that line, it appears conclusive to us that it has become the boundary line between the plaintiffs' lands and those of the defendants.

In a case very similar on its facts, this court said: "Where one, by mistake as to the boundary line, constructs upon and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession." Converse v. Kenyon, 178 Neb. 151, 132 N. W. 2d 334. See, also, Mentzer v. Dolen, 178 Neb. 42, 131 N. W. 2d 671; Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331.

The sufficiency of the possession in an action of this kind depends upon the character of the land and the use that can reasonably be made of it. The possession is sufficient if the land is used continuously for the purpose to which it is adapted because of its nature and character. The acts of dominion over land of the title owner, to be effective against him, must be so open, exclusive, and continuous as to put an ordinarily prudent person on notice that his lands are in the adverse possession of another. Converse v. Kenyon, *supra*. The evidence in this case shows that the possession was continuous and for the purpose for which adapted for a period in excess of 10 years. This meets the requirements as to proof in such cases. Mentzer v. Dolen, *supra*.

The defendants Stice have cross-appealed. These de-

fendants contend that they obtained title to lands south of the Relf survey line in Section 4 by adverse possession prior to 1938, after which year the land became inaccessible because of the change in the riverbed of the Missouri River. The evidence does not adequately show the adverse possession of the lands south of the Relf survey line extended east to permit the tacking of their alleged adverse possession to that of these defendants. It is quite evident that the former owners claimed only to the boundary line fixed by the Relf survey and the evidence does not show a hostile possession of lands south of that line.

The trial court having come to these same conclusions the judgment of the district court is affirmed.

AFFIRMED.

SCHOOL DISTRICT NO. 23 OF DAKOTA COUNTY, NEBRASKA, ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 11 OF DAKOTA COUNTY, NEBRASKA, ET AL., APPELLANTS.

148 N. W. 2d 301

Filed January 27, 1967. No. 36377.

1. **Constitutional Law: Schools and School Districts.** The legislative function in transfers of land among school districts is unaffected by constitutional guaranties of procedural due process.
2. **Administrative Law.** A trial type of administrative hearing is ordinarily required for disputes of adjudicative facts.
3. **Administrative Law: Appeal and Error.** An order of an administrative officer is not reviewable by error proceedings under section 25-1901, R. R. S. 1943, unless the officer exercised judicial functions. The phrase "judicial functions" refers to disputes of adjudicative facts and to administrative action in a judicial manner required by statute.

Appeal from the district court for Dakota County: JOHN E. NEWTON, Judge. Reversed and remanded with directions.

Smith, Smith & Boyd and Cecil W. Orton, for appellants.

Ryan & Scoville and McKinley & Jandt, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and LYNCH, District Judge.

SMITH, J.

A county superintendent of schools attached to one school district the lands of another district, which he also dissolved. On review of the order in an error proceeding the district court found the evidence insufficient, and it therefore vacated the order. This appeal followed.

The parties argue not only sufficiency of the evidence but also constitutionality of the statute under which the administrative order was made. Appellees say that absence of a statutory provision for notification and hearing denied them due process of law. Inseparable from the argument is the further question whether the order might be attacked by error proceedings.

The superintendent asserted authority under this statute: "When a river has changed or changes its channel so that the original boundaries of the school district have been changed and the district is less in area than four full sections of land, exclusive of accreted lands, and the school district has fewer than twenty persons of school age, the county superintendent shall attach such remainder or portion to an adjoining district or districts." § 79-408.01, R. R. S. 1943.

Although the statute authorized summary action, the superintendent published notice of hearing, announcing that School District No. 23 was subject to merger with neighboring school districts. At the appointed time and place he held a hearing at which appellees were represented. He orally stated in some detail that the area of School District No. 23 was 1,208.5 acres, exclusive of accretion, and that only 12 children of school age resided there. The district was bounded by the Missouri River, but nothing in the record shows that a channel change reduced the size of the district. Appellees unsuccessfully objected to deprivation of a right to cross-

examine the superintendent. The subsequent order transferred all the land of School District No. 23 to School District No. 11.

The initial decision in the transfer of land from one school district to another is legislative. In that respect transfers are unaffected by constitutional guaranties of procedural due process. See, Halstead v. Rozmiarek, 167 Neb. 652, 94 N. W. 2d 37; School Dist. No. 7 of Wallowa County v. Weissenfluh, 236 Or. 165, 387 P. 2d 567. A statute directing detachment of land without a hearing was held, however, to violate due process. Schutte v. Schmitt, 162 Neb. 162, 75 N. W. 2d 656.

The statute in the Schutte case described school districts in terms of voters, pupils, and contracts with other districts for tuition and transportation. It directed the county superintendent to dissolve those districts summarily. The court said that the administrative authority was legislative but that a finding of facts necessary for authority was quasi-judicial. It concluded that lack of a provision for notification and a trial type of hearing violated constitutional due process.

The thought of fixing boundaries without an administrative hearing had not shocked the court in prior cases. "The framers of the statute could, had they so desired, (have) authorized a county superintendent to form two or more school districts out of an existing one, without any petition whatever of the voters of the district affected, or without any notice * * *." State ex rel. School Dist. No. 1 v. School Dist. No. 19, 42 Neb. 499, 60 N. W. 912. See, also, State ex rel. Diemer v. Frye, 100 Neb. 364, 160 N. W. 112.

The statute in the Schutte case affected private interests in respect to taxes and educational opportunity. In spite of those consequences there was no occasion for individual controversy prior to the administrative decision. See School Dist. No. 7 of Wallowa County v. Weissenfluh, *supra*. The facts were not adjudicative within the "principle * * * that a trial type of hearing

is ordinarily required for disputes of adjudicative facts." 1 Davis, Administrative Law Treatise, § 7.03, p. 415. The Legislature itself had not intimated that the superintendent was to act in a judicial manner. The court in Schutte mistakenly relied on the construction of a far different statute in Ruwe v. School Dist. No. 85, 120 Neb. 668, 234 N. W. 789. For these reasons the Schutte case is overruled.

In the present case the superintendent decided no dispute of adjudicative fact, and no statute required him to act in a judicial manner. Such orders are not reviewable by error proceedings, which are limited to orders made in the exercise of judicial functions. §§ 25-1901 and 25-1903, R. R. S. 1943; Longe v. County of Wayne, 175 Neb. 245, 121 N. W. 2d 196. In such circumstances collateral attack offers an adequate remedy. See, Bierman v. Campbell, 175 Neb. 877, 124 N. W. 2d 918; Elliott v. City of Auburn, 172 Neb. 515, 110 N. W. 2d 218 (Spencer, J., dissenting).

The judgment is reversed and the cause remanded with directions to dismiss the petition in error.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT, v. DEWEY C. DAY ET AL., APPELLEES.

147 N. W. 2d 919

Filed January 27, 1967. No. 36381.

Eminent Domain. When a petition in condemnation is accompanied by a plat or map, the plat or map should be used as an aid in the construction of the petition.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and Warren D. Lichty, Jr., for appellant.

William H. Meier, Jesse T. Adkins, and Ward W. Minor, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and LYNCH, District Judge.

SPENCER, J.

The only question involved herein is whether a condemnation for a permanent easement for the control of outdoor advertising extended for 660 feet from the main-traveled way of Interstate Highway No. 80, or whether it extended from the edge of the right-of-way.

Dewey C. Day and Laura Kirk Day are life tenants of real estate located along the north exit road to Minden, Nebraska, on the Interstate. Harold Warp, owner of Pioneer Village at Minden, is the lessee of advertising rights on a barn on said premises which the State contends is within the area of the easement secured by a condemnation of outdoor advertising rights. The barn is approximately 28 feet within the easement if the easement extends from the edge of the right-of-way.

Subsequent to the condemnation, directional signs for Pioneer Village were painted on the barn. This action is to enjoin that advertising. The trial court determined that an ambiguity existed in the condemnation of the outdoor advertising easement, and specifically found that the written part of the condemnation is such that the 660 feet should be measured from the center of the Interstate, rather than the edge of the right-of-way. The State has perfected an appeal to this court.

The written part of the condemnation is exhibit No. 15. The pertinent portion thereof is as follows: "Permanent easement to a tract of land for the control of outdoor advertising as illustrated on the attached plat and being more particularly described as all that part of Lots 6, 7, and the West 26.74 Acres of Lot 8 in Section 6 and land accreted thereto, Township 8 North, Range 14 West of the 6th P.M., Buffalo County, Nebraska, lying within 660 feet of the Interstate Highway Right of Way Con-

trolled Access lines as measured at right angles to the centerline of said Interstate Highway and being in accordance with the Rules and Regulations Relating to the Control of Advertising in Areas Adjacent to the National System of Interstate and Defense Highways in Nebraska, * * *."

We do not agree that there is any ambiguity in exhibit No. 15. There is no question the plat attached shows the area condemned to extend for 660 feet from the edge of the access road off the Interstate. When a petition in condemnation is accompanied by a plat or map, the plat or map should be used as an aid in the construction of the petition. See, Fremont, E. & M. V. R.R. Co. v. Mattheis, 39 Neb. 98, 57 N. W. 987; Brodine v. State, 180 Neb. 433, 143 N. W. 2d 361.

Ignoring for the moment the words "as illustrated on the attached plat" we are still unable to find any ambiguity. The language referred to is "lying *within* 660 feet of the Interstate Highway Right of Way Controlled Access lines." (Emphasis supplied.) "Within" refers to the area embraced in the 660 feet. "Controlled Access lines" refers to the lines bordering access roads. This is exactly what is designated on the plat. The controlled access lines shown on the plat are the edge of the Interstate right-of-way. The sign painted on the barn is 632.2 feet from the controlled access line. The reference "as measured at right angles to the centerline" of the Interstate is merely to prescribe the method of the measurement of the 660 feet from the right-of-way controlled access line.

Appellees urge that the intent of our statute is to limit condemnation to that area reasonably necessary to qualify for the payments authorized by 23 U. S. C. A., § 131, p. 59, as shown by sections 39-1320 (2) (m), 39-1320.01, and 39-1320.03, R. S. Supp., 1965. Section 39-1320 (2) (m), R. S. Supp., 1965, is as follows: "The control of outside advertising within the area adjacent to and within six hundred sixty feet of the edge of the right-of-way

of the National System of Interstate and Defense Highways constructed upon any part of right-of-way the entire width of which is acquired subsequent to July 1, 1956, to the end that this state may qualify for and accept the provisions of 23 United States Code 131, as amended."

Appellees argue it is not reasonable or necessary to require the taking of an outdoor advertising easement for more than 660 feet from the right-of-way of the main-traveled portion of the Interstate. They would exclude access roads located within the right-of-way from consideration. However, the statute provides that the easement shall be from the edge of the right-of-way, not from the edge of the main-traveled portion of the Interstate. Appellees do not deny that the access road is located on the right-of-way acquired for the construction of the Interstate. They infer, however, that they are discriminated against because of the access road. Here the barn is more than 1,000 feet from the main-traveled portion of the Interstate.

Adopting the premise that their interpretation would conform to the federal law and the agreement between the State and the federal government, appellees assert the condemnation was more extensive than was necessary. We do not accept their premise, so there is no need to discuss their contention. There may be some logic to appellees' position. It would provide more uniformity on the extent of advertising easements throughout the length of the Interstate, but the law is otherwise. To read into the statute the words "main-traveled portion" would be to write an amendment into the law. This we cannot do. The law is plain and unambiguous.

We reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

WAYNE R. SWANSON, RELATOR, V. FRED SORENSEN, RESPONDENT.

148 N. W. 2d 197

Filed January 27, 1967. No. 36570.

1. **Constitutional Law.** In adopting the constitutional provision creating the State Railway Commission, it was made an independent part of the Constitution of Nebraska and not as an amendment to the executive, legislative, or judicial articles thereof.
2. ———. Wayne R. Swanson determined to be the duly elected and qualified Treasurer of the State of Nebraska.

Original action. Judgment for relator.

James E. Ryan, Jerry L. Snyder, Jack W. Marer, and Einar Viren, for relator.

William L. Walker and Ralph R. Bremers, for respondent.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

SPENCER, J.

Relator, Wayne R. Swanson, was granted leave to file an original action in quo warranto in this court against respondent, Fred Sorensen. Relator, while serving as a duly elected State Railway Commissioner, filed as a candidate for the office of State Treasurer, secured the Republican nomination, and was duly elected over respondent, the Democratic nominee who was the incumbent. Relator was declared elected and qualified by filing a bond and taking the oath, but respondent upon demand has refused to vacate the office.

There is on file herein a demurrer to the petition, a separate demurrer, an answer and cross-petition, and a motion for summary judgment. There is no fact issue for consideration. We do not deem it necessary to consider any of the procedural questions, and direct our attention solely to the basic issue herein, the eligibility of the relator.

It is the contention of the respondent that the relator as a railway commissioner is an executive state officer and as such was disqualified from filing for the office of State Treasurer and is ineligible to accept said office. Respondent's contention is premised on the conclusion that the Nebraska State Railway Commission is created by Article IV, section 20, Constitution of Nebraska, and since section 20 is a part of Article IV, the railway commissioners fall within the prohibition of section 2 of said Article IV.

Article IV, section 1, Constitution of Nebraska, so far as material herein, provides: "The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law."

Article IV, section 2, Constitution of Nebraska, so far as material herein, provides: "None of the officers mentioned in this article shall be eligible to any other state office during the period for which they have been elected or appointed, * * *." In the Constitution of 1875, this provision was Article V, section 2, and read: "None of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected." The present wording was adopted in 1920. This amendment was probably deemed essential because section 1 at that time was broadened to include the heads of such other executive departments as may be established by law.

The history of Article IV, section 20, Constitution of Nebraska, is pertinent to the determination of the question involved. In 1883, the Legislature addressed an inquiry to this court asking whether railway commissioners would be executive state officers and if the Legislature could legally create such office. The court determined that the duties of the office would be executive and that the Legislature was without power to create a

new executive state office. See In re Railroad Commissioners, 15 Neb. 679, 50 N. W. 276.

In 1905 the Legislature by joint resolution submitted a constitutional amendment creating the office of State Railway Commissioner. Laws 1905, c. 233, § 2, p. 791. This section was adopted on November 6, 1906, and was incorporated into the Session Laws of 1907 as a separate amendment to the Constitution of Nebraska. Laws 1907, p. 46. It was carried as a separate section of the Constitution until the issuance of the Session Laws of 1913. At that time, it appeared as Article V, section 19A, Constitution of Nebraska. Laws 1913, p. 24. Article V covered the executive department and is Article IV of the present Constitution. This history is detailed in State ex rel. Shields v. Hall, 103 Neb. 17, 170 N. W. 173. No amendments to this section were proposed by the Constitutional Convention of 1919 and 1920, although the specific point of the inclusion of the State Railway Commissioners in the enumeration of officers in section 1 was considered. It was adopted, and subsequently abandoned. The section was not amended until 1962, and that amendment is not pertinent to the present question.

Article IV, section 20, Constitution of Nebraska, as originally adopted, reads as follows: "There shall be a State Railway Commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the Legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

This section was amended in 1962 to provide for not more than seven and not less than three commissioners; and to provide for their election from districts rather than at large, but in other respects remained essentially the same.

While In re Railroad Commissioners, 15 Neb. 679, 50 N. W. 276, is not a decision of this court in the technical sense of the term, in 1911 in State ex rel. Mortensen v. Furse, 89 Neb. 652, 131 N. W. 1030, this court said: "We agree with counsel for relator that the office of railway commissioner is, under the constitution, to be classed as an executive office. Of this we think there can be no doubt, as it can neither be said to be legislative, nor judicial, and the three classes are the only ones given by that instrument."

In 1919, this court had before it In re Lincoln Traction Co., 103 Neb. 229, 171 N. W. 192, in which questions were raised as to the extent and the limits of the jurisdiction and the authority of the State Railway Commission, particularly as relating to legislative and judicial powers. In that case, we held: "In adopting the constitutional provision creating the state railway commission, it was made an independent part of the Constitution, and was not designated as an amendment to the executive, legislative or judicial articles of the Constitution. The fact, therefore, that it has, by the compilers, been placed in article V, which relates to the executive department of the government, affords no assistance in its construction. Its language is clear, as follows: 'There shall be a state railway commission, consisting of three members, who shall be first elected, at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the Legislature.' Its powers and duties include 'the regulation of rates, service and general control of common carriers.' The legislature may make provision as to these powers and duties, but the commission, 'in the absence of specific

legislation, shall exercise the powers and perform the duties enumerated.' It was submitted to the people by the legislature of 1905. Laws 1905, ch. 233. Unless there has been specific legislation that might limit or affect this power given to the commission, it would seem that the people have given this commission all the control over common carriers that they themselves could exercise. While this power must be exercised in harmony with the provisions of the federal Constitution, and the general provisions of our own Constitution that affect all branches of the government, it is plainly not limited by the special provisions of the Constitution which distinguish between the legislative and judicial departments of the government. The functions of this commission are largely administrative, but, as is stated in Prentis v. Atlantic Coast Line Co., supra (211 U. S. 210), the commission necessarily has independent legislative, judicial, and executive or administrative powers."

In Petersen v. Beal, 121 Neb. 348, 237 N. W. 146, we held: "This court is committed to the view that, 'In adopting the constitutional provision creating the state railway commission, it was made an independent part of the Constitution, and not as an amendment to the executive, legislative or judicial articles thereof.' In re Lincoln Traction Co., 103 Neb. 229."

In Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, we reaffirmed this position. In that case, involving the scope of the review in this court of an action of the railway commission, administrative or legislative in nature, we said: "* * * appellants confuse the administrative, legislative, and judicial field of action. In adopting the constitutional provision creating the state railway commission, it was made an independent part of the Constitution, and not as an amendment to the executive, legislative, or judicial articles thereof. In re Lincoln Traction Co., 103 Neb. 229, 171 N. W. 192."

A hasty search would indicate our last statement on this point is found in State ex rel. Johnson v. Chase,

147 Neb. 758, 25 N. W. 2d 1. There we said: "In this connection, section 20, article IV, of the present Constitution shows the creation of the State Railway Commission, providing for the election of the commissioners, length of term to be served by the commissioners, and the powers and duties of the commission. It is a constitutionally created body, as distinguished from an executive department or commission created by the Legislature."

For the last 48 years this court has been committed to the view that in adopting the constitutional provision creating the State Railway Commission, it was made an independent part of the Constitution and not as an amendment to the executive, legislative, or judicial articles thereof. To discredit those holdings at this late date by deciding that railway commissioners are embraced within the exclusion of executive officers in Article IV, section 2, Constitution of Nebraska, merely because compilers of the Statute have seen fit to place section 20 in Article IV, would be to ignore the realities of the situation and to open a Pandora's box of future trouble because of the impact of the previous holdings. The relator at all times was eligible to be a candidate for State Treasurer.

For the reasons given, Wayne R. Swanson is the duly elected and qualified Treasurer of the State of Nebraska, and respondent is hereby ordered and directed to deliver to the said Wayne R. Swanson all books and papers in his custody and under his control belonging to said office.

JUDGMENT FOR RELATOR.

CHARLES W. WILBUR ET AL., APPELLANTS, V. SCHWEITZER EXCAVATING CO., A CORPORATION, ET AL., APPELLEES.
148 N. W. 2d 192

Filed February 3, 1967. No. 36263.

1. **Negligence. It is fundamental that in order to constitute ac-**

tionable negligence there must be a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and damage resulting therefrom.

2. **Vendor and Purchaser: Easements.** Ordinarily a purchaser of real estate is charged with notice of an easement only where its existence is apparent from an inspection of the premises or where he is charged with notice from the recording laws.
3. **Negligence: Evidence.** Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negligently is generally competent evidence.
4. **Gas: Negligence.** In the absence of knowledge either actual or constructive there is no duty on the part of a general contractor or an excavator employed by him to ascertain the existence of a gas service pipeline running across vacant private property.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Kier, Cobb & Luedtke, Larry T. Reida, and Healey & Healey, for appellants.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, Charles M. Pallesen, Jr., and Fraizer & Fraizer, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and NEWTON, District Judge.

WHITE, C. J.

A gas fire in plaintiffs' house on May 13, 1964, was caused by an excavator striking a gas service line running across a vacant building lot immediately to the south of plaintiffs' house. Plaintiffs sued the excavator, Schweitzer Excavating Company, and Schweitzer's employer, Victory Realty, Inc., and Victor E. Larson, its president. At the close of the plaintiffs' evidence the trial court directed a verdict for all of the defendants and this appeal followed,

The pertinent facts of this case are almost undisputed. Plaintiffs were the owners of a house at 6341 Colby

Street, facing north and situated on the north portion of a tract of land owned by plaintiffs, described as Lots 1, 2, and 3, Block 35, Bethany Heights, Lincoln, Lancaster County, Nebraska. Sixty-fourth Street runs north and south immediately to the east of Lot 1. Plaintiffs sold the south 60 feet of Lots 1 and 2, and the east 40 feet of the south 60 feet of Lot 3 to defendant Victory Realty, the deeds being recorded on April 24, 1964. Plaintiffs knew a house was going to built on the property. Easements on their property were granted and recorded as to sanitary and storm sewers, power and electric lines, and for underground circuits of the Lincoln Telephone and Telegraph Company. But there were no reservations or filings relating to any easement for gas lines or similar installations on the property, either in the office of the register of deeds or in the application filed at the city hall to subdivide the lots. The gas pipeline ran north from the gas main in the alley between Sixty-third and Sixty-fourth Streets to the southeast corner of plaintiffs' house, across the property deeded to defendant Victory Realty. The pipeline was about 2 feet beneath the surface, and there was nothing on the surface to indicate its presence. None of the parties knew of its existence. There was a gas main in Sixty-fourth Street as well as in the alley. Plaintiffs knew their house was serviced by gas and had an outside gas lamp installed to the north and in front of the house. The records of the gas company showed the installation of the gas service line on June 3, 1949.

On May 5, 1964, the defendant Victory Realty contracted to build a house on the tract in question for Mr. and Mrs. Galen Miner, and deeded the property to them on May 8, 1964, 5 days before the fire. Defendant Victory Realty orally contracted with defendant Schweitzer Excavating Company to do the excavating work for the basement. On May 13, 1964, Schweitzer's employee, Louthan, operating a front-end loader type of earth moving equipment, struck the gas service line, lifting it

up, pulling it loose and away from the house, causing the escape of gas which followed the remainder of the pipe into the basement, and resulting in a fire when ignited by a hot water heater that was sitting directly under the gas service. Extensive damage resulted.

It is undisputed that none of the defendants had any actual knowledge of the gas service line running across this vacant tract of ground, nor were there any easements or notice of record charging them with knowledge of its existence. It also appears that there was nothing on the surface of the ground that would put the defendants on notice of the existence of the gas line. The plaintiffs' primary contention is that the contractor Victory Realty and the defendant Schweitzer Excavating Company had the duty to check with the gas company to ascertain the existence and location of the gas service line.

It is fundamental that in order to constitute actionable negligence there must be a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and damage resulting therefrom. Ring v. Kruse, 158 Neb. 1, 62 N. W. 2d 279; Langenfeld v. Union P. R.R. Co., 85 Neb. 527, 123 N. W. 1086; McDonald v. Omaha & C. B. St. Ry. Co., 128 Neb. 17, 257 N. W. 489; Peterson v. State Automobile Ins. Assn., 160 Neb. 420, 70 N. W. 2d 489; 65 C. J. S., Negligence, § 4 (1), p. 475.

Was there a duty, under the circumstances, to check with the gas company and discover the existence and location of the gas pipeline? We think not. Plaintiffs cite no authorities that support their position. They cite McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384, an automobile accident case, and quotations as to the general definitions of negligence and proximate cause from Restatement, Torts, and Corpus Juris Secundum. With the law therein cited we are in agreement but none of these authorities bear on the precise question presented under the facts herein. They cite

Ohio Fuel Gas Co. v. Pace Excavating Co., (Ohio App., 1963), 187 N. E. 2d 89. This was an indemnity action by a gas company against an excavator for damages it had paid resulting from a fire and explosion occurring in a home as the result of leaking gas. The petition alleged that the excavator had negligently struck and damaged a gas line and had covered it without repairing it or warning others of its dangerous condition. The case turned on questions of indemnity law and active and passive negligence, and no issues were raised or discussed as to whether or not the excavator had knowledge of or a duty to ascertain the existence of the gas line. The case has no bearing on the issues in this case.

The cases touching on this subject seem to establish a duty on the part of an excavator in a public street or road to ascertain the existence of the pipelines, and other conduits. Pioneer Natural Gas Co. v. K. & M. Paving Co. (Tex., 1963), 374 S. W. 2d 214; Frontier Telephone Co. v. Hepp, 66 Misc. 265, 121 N. Y. S. 460; Willmar Gas Co., Inc. v. Duininck (1953), 239 Minn. 173, 58 N. W. 2d 197; Illinois Bell Telephone Co. v. Charles Ind Co. (1954), 3 Ill. App. 2d 258, 121 N. W. 2d 600; Annotations, 53 A. L. R. 2d 1083, 5 A. L. R. 2d Later Case Service, p. 287.

We find no cases that support the existence of such a duty under the circumstances of this case where there was no actual knowledge of the gas service line, nothing on the surface to indicate its presence, and no recording in the public records of its existence. A case closely in point is Perry v. Ready Mix Concrete Constr. Co., 66 Ga. App. 716, 19 S. E. 2d 196. In that case the defendant was employed as an independent contractor and while grading on a private lot within the city he struck a gas line which caused an explosion. The petition alleged in substance no actual knowledge by the defendant of the pipeline but alleged that it should have ascertained the existence of the pipeline; that he should have known of the existence of the pipeline since he was engaged in the business of grading and leveling

lots on urban property; and that he should have anticipated the presence of a gas pipeline on the lot. In sustaining a demurrer to the petition the court said: "Of course, the right to recover of the defendant depends upon the existence of three facts: (a) A legal duty resting on the defendant towards the plaintiff; (b) the violation of that duty by the defendant; (c) injury and damage to the plaintiff proximately resulting from the breach of the defendant. The petition fails to show any duty owed by the defendant to the plaintiff. It did not own the lot and was under no general duty to know of the presence of a pipe line beneath the ground. The allegations of the petition charge at most only constructive or implied notice to the defendant as to the existence of the pipe line or as to its duty to anticipate. Such allegations, without facts showing why the defendant should have known of or should have anticipated the presence of the pipe line on the lot, are not good against general demurrer. Smith v. Jefferson Hotel Co., Inc. 48 Ga. App. 596, 599 (173 S. E. 456). As was said in Pacetti v. Central of Ga. Ry. Co., 6 Ga. App. 97: 'In that class of cases in which the duty of anticipation is normally absent, the plaintiff, in order to assert a valid cause of action, must state unequivocally that the defendant had actual knowledge, or else must set up such a state of facts and circumstances as would take the case out of the normal, and raise the duty where it otherwise would not exist.' See also Fulton Ice Co. v. Pece, 29 Ga. App. 507, 519 (116 S. E. 57). The allegation that the fact that the defendant knew that pipe lines with explosive gas were laid underneath the ground 'on various and sundry lots in the City of Columbus' and that because of this knowledge it should also have known of the existence of the pipe line under the lot in question is not, in our opinion, more than a conclusion, and is not sufficient to support the charge of constructive knowledge, especially when it is otherwise shown by the petition that there was no house, building, or struc-

ture on the premises to suggest the presence of a gas service pipe line."

The pertinence of this case to the present one is apparent. We further point out that in the present case the presence of a gas line was negatived by the absence of notice from any public record although other easements were granted and of record. We point out further that a purchaser of real estate is charged with notice of an easement only where its existence is apparent from an inspection of the premises or where he is charged with notice from the recording laws. 55 Am. Jur., Vendor and Purchaser, § 732, p. 1100; Schmidt v. Hilty-Forster Lumber Co., 239 Wis. 514, 1 N. W. 2d 154; 28 C. J. S., Easements, § 49, p. 712.

In Mountain States Tel. & Tel. Co. v. Kelton, 79 Ariz. 126, 285 P. 2d 168, the defendant excavator under a contract with the owners, dug up and damaged a buried telephone cable on private property, the easement for which had been duly recorded. In holding for the defendant excavator the court said: "It is admitted that the contractor had no actual notice that there was a buried cable, nor was this fact apparent from the visible inspection made by them of the premises prior to commencing the contracted work. We cannot agree with the implication that the contractor was bound to search the records and is charged with constructive notice of the contents thereof. * * * We do not believe the contractor in the instant case was bound to search the record to learn of plaintiff's easement. He had no interest in the title to the land. We have been cited to no cases where constructive notice was applied to such a situation, nor has an independent search revealed such an extension of the doctrine. We hold defendants Kelton were not charged with notice of plaintiff's easement, hence this assignment of error is without merit." See, also, Goldstein v. Hunter, 232 App. Div. 431, 250 N. Y. S. 374.

We hold, therefore, that under the circumstances of

this case, there was no evidence of actual or constructive knowledge of the existence and location of the gas service line, and consequently no duty to protect against this hazard arose as to the defendants.

Plaintiffs' next contention overlaps their first. They contend that the defendants had knowledge of the gas line because it was shown that there was a gas lamp to the north and in front of the house at 6341 Colby Street, owned and installed by plaintiffs. The light was situated about a quarter of a block from the construction site and to the north of the house while the excavation was to the south. The existence of the lamp gave no indication of where the gas service line ran. They further argue that the defendants should have known the location of the line because they are charged with knowledge that the gas mains were laid in the alleys in Bethany. But the evidence is that some were in the alleys and some in the streets, and there was a gas main to the east in Sixty-fourth Street running past 6341 Colby Street, the plaintiffs' house. None of the defendants had actual knowledge of a gas main in the alley. There is no merit to these contentions.

Plaintiffs complain that the trial court erred in sustaining an objection to a question directed at the witness Kenneth Schweitzer asking him if there was a "hazard" in hitting a line on property within the city. The question called for a conclusion and opinion and the objection was properly sustained. Furthermore, the answer as shown in the offer of proof, "Well, this could be held true anyplace whether in the city or where it is," is so vague and general as to have no bearing on the actual issue being tried, actual or constructive knowledge of the location of the line.

Much of the argument in the briefs is devoted to the questions of whether the plaintiffs, who sold the property with knowledge that a house was going to be built thereon, had a duty to reserve an easement for their gas service line or to otherwise discover and warn of

the location and existence of the line, since they had knowledge that there was a gas line and had granted other easements. In light of our determination as to the duty of the defendants herein, we do not deem it necessary to decide this issue.

We point out that the plaintiffs failed to produce any evidence as to the custom in the community, any standard of care, or expert testimony indicating that any of the defendants had a duty to check with the gas company and have it locate the gas service line. Our court has held that evidence of the ordinary practice or of the uniform custom of persons in the performance of acts under similar circumstances of acts like those alleged to be negligent is competent evidence. In O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123, it was stated as follows: "The general rule is that '* * * upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently is generally competent evidence.' 38 Am. Jur., Negligence, § 317, p. 1015. See, also Annotation, 137 A. L. R. 611; Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N. W. 2d 90, 149 A. L. R. 1164." See, also, Brackman v. Brackman, 169 Neb. 650, 100 N. W. 2d 774. There is no evidence showing ordinary practice or custom on the part of contractors or excavators in the community with reference to locating gas service lines. The evidence is that customers and other people, including contractors, do make inquiries and that the gas company has a pipe locator. This is not sufficient evidence to establish a legal duty on the part of the defendants.

The only real issue in this case is whether as a matter of law the defendants were under a duty to ascertain the existence of a gas pipeline when there was no easement reserved or public record of its existence, and they had no actual knowledge of it or conditions ex-

isting on the premises to warn them of it. That issue must be resolved adversely to plaintiffs.

Since there was no duty arising from knowledge, actual or constructive, of the existence and location of the gas service line as to any of the defendants it, therefore, becomes unnecessary to determine any issues as to a difference in liability existing between the contractor, Victory Realty, Inc., and the subcontractor, Schweitzer Excavating Company.

The judgment of the district court dismissing the action as to all defendants is correct and is affirmed.

AFFIRMED.

Note: Since this case was submitted, John E. Newton, District Judge, has become a Judge of this Court.

ORA P. RANDALL, APPELLANT, V. THOMAS LIAKOS ET AL., APPELLEES.

VICTORIA LIAKOS ET AL., APPELLEES, V. MILO RANDALL ET AL., APPELLEES, IMPLEADED WITH ORA P. RANDALL, APPELLANT.

148 N. W. 2d 204

Filed February 3, 1967. Nos. 36325, 36326.

Equity: Trial. While the law requires this court, in determining an appeal in an equity case involving questions of fact, to reach an independent conclusion without reference to the findings of the trial court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on material issues, consider the fact that the trial court observed the witnesses and their manner of testifying.

Appeals from the district court for Morrill County: JOHN H. KUNS, Judge. Affirmed in part, and in part reversed and remanded with directions.

Atkins, Ferguson & Nichols, for appellant.

Wright, Simmons & Hancock, for appellees Liakos et al.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and FLORY, District Judge.

FLORY, District Judge.

Involved in these cases is a strip of real estate 29 feet wide on the west and 128 feet wide on the east running west to east across Section 6, Township 21 North, Range 51 West of the 6th P.M. in Morrill County, Nebraska. The record title to this strip is in the appellees Liakos. The appellant Randall has record title to the real estate adjacent to the disputed strip, on the north, and claims title to the disputed area by adverse possession and by acquiescence and acceptance of an alleged boundary under section 34-301, R. R. S. 1943.

The trial court found and decreed in favor of appellees Liakos and against the appellant Randall, quieting title to the disputed strip in the appellees.

The cases are, of course, before this court de novo and while the law requires this court, in determining such an appeal to reach an independent conclusion without reference to the findings of the trial court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

The evidence is in material conflict and the testimony of the various witnesses need not be detailed. A material undisputed fact is that there is and has been since before 1929 a well and windmill in the northwest corner of the strip of disputed land that serves the improvements and dwellings of the appellant some distance to the north by a pipeline. It was located there because water was not obtainable anywhere else. It also appears that from the well east the strip was mainly a ridge of blow sand varying in width from a few feet to 40 to 50 feet past the center of the section and that the eastern part of the strip was pasture in which there is an irrigation lateral serving the land of the appellees. The evi-

dence is conflicting as to the use made of the disputed area by the parties and their predecessors. It also conflicts as to the location, purpose, and reason for the location of various posts, fences, trees, and various irrigation devices.

Considering all of the evidence we are of the opinion that until recently when land leveling activities were begun by the parties, the disputed area was of little use or concern to either of the parties and that the trial court did not err in failing to find that appellant had established title to it by proving all the necessary elements of adverse possession.

As to the well in the northwest corner, however, the court should not have quieted title in the appellees Liakos. The evidence is clear and undisputed that appellant and his predecessors have used it and its pipeline openly, exclusively, and continuously since before 1929. The evidence indicated that it was located there by necessity, negating a claim of adverse possession on the part of appellant, instead it indicates the establishment of a prescriptive right.

From what we have already said appellant's claim under section 34-301, R. R. S. 1943, necessarily fails.

The judgment of the trial court is affirmed, except as it quiets title in appellees Liakos to the well and its appurtenances and the pipeline as to which the judgment is reversed and the cause is remanded for further proceedings to determine the prescriptive rights of appellant in the well and pipeline.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. GILBERT SAGASER, APPELLANT.

148 N. W. 2d 206

Filed February 3, 1967. No. 36355.

Criminal Law. In a post conviction proceeding, petitioner has the burden of establishing a basis for relief.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Asa A. Christensen, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and WEAVER, District Judge.

SPENCER, J.

This is a proceeding under the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1965. Petitioner, Gilbert Sagaser, hereinafter referred to as defendant, was convicted of second degree arson growing out of a fire at the Nebraska State Penitentiary, August 16, 1955. On November 9, 1955, he was sentenced to 9 years in the State Penitentiary, said sentence to be consecutive to and to commence at the expiration of all previous sentences. His amended petition herein enumerated 15 alleged violations of his constitutional rights. The trial court granted a hearing on three of them. After the hearing, defendant's petition was dismissed and this appeal perfected.

Defendant sets out three assignments of error, all of which are predicated upon alleged violations of constitutional rights at his trial. The first is that he was denied witnesses for his defense. There is no merit to this assignment. Defendant made no attempt to call any of these particular witnesses. Nor is there any showing that if called their testimony would not have been entirely cumulative. To sustain his contention,

defendant produced five fellow inmates who were serving sentences in August of 1955. One of them had been subsequently tried and convicted of the same offense. This witness testified that he told the warden he knew Sagaser had nothing to do with setting the fires and wanted to testify for him, and that the warden threatened him with dire consequences if he did so. His testimony in substance is that he was with Sagaser during the critical period and that Sagaser was not near the area of the fire.

Defendant's next witness, an inmate with seven felony convictions, testified that defendant was not near the critical area at any time. The following testimony may be revealing: "A Yes, sir; I seen him sitting on the bleacher part of the yard at the time. Everybody was looking up that way and I looked at him *and everybody was looking to see where Gib was.*" (Italics supplied.) This witness also testified that he told the warden he wanted to testify for Sagaser, but the warden told him to leave it alone if he wanted a parole.

Defendant's third witness has four felony convictions. His testimony is that after the fire he approached the deputy warden in the penitentiary yard and told him he wanted to testify for Sagaser, and that the deputy told him if he wanted any consideration for a parole he better leave it alone. This testimony is denied by the deputy warden.

Defendant's fourth witness has three felony convictions. It is his testimony that he stopped the warden when he came through the tailor shop, and was reprimanded.

Defendant's last witness testified that he was told not to testify by various inmates, but could not give any names.

The 1955 warden was called as a witness for the State. He categorically denied that he had ever threatened any of the witnesses or anyone else, and testified that

he would not have done so if they had talked to him about the matter.

The defendant was furnished with able counsel before his arraignment on the arson charge, and had efficient representation at every stage of that proceeding. The record indicates that defendant cooperated fully with his trial attorney and at no time ever expressed any dissatisfaction with the way his defense was conducted. The record further indicates that compulsory process was issued for eight inmates of the penitentiary at the defendant's request. Of these inmates, seven, one of whom was later convicted on the same charge, testified in defendant's behalf. Defendant concedes that every witness he wanted called was called, but suggests that he did not call others who could have testified because: "A I was afraid that these people would be harmed by the administration and by the Court in some of their own cases if they were to testify for me in my case." There is no evidence in this record that defendant was denied witnesses for his defense.

Defendant's second assignment of error is predicated upon the allegation that after the pronouncement of the sentence he was not informed by the court of his right to appeal the conviction and sentence. We do not understand that our law placed this burden on the trial judge. This point, however, is immaterial because the defendant on cross-examination stated that he was aware of his right to appeal.

Defendant's third assignment of error is that he was denied the right to appeal because he was not afforded counsel to effect that appeal, and was held in solitary confinement past the time allowed for an appeal to be perfected. This assignment is equally without merit. The record indicates that subsequent to the verdict, defendant's attorney visited him at the penitentiary on two separate occasions relative to the verdict and a motion for a new trial.

A motion for a new trial was filed. It was overruled,

and defendant's counsel appeared with him for sentencing. After defendant was sentenced, his attorney discussed the probable result of appeal with him. Defendant's trial attorney testified in part as follows: "* * * I am sure I advised Gilbert that I didn't think the chances on appeal were very good; * * *. And then the next thing was I said I wanted to be sure so far as my own position was concerned, did he want me to continue, or was he discharging me as of that time when we had finished, and he said he did not want me to continue and he was discharging me at that time. And he did discharge me as of November 9, 1955. Q He stated to you that he did not want you to continue in the appeal of this case; is that correct? A That's correct. Q At anytime did he ask you to appeal the case? A No, he did not ask me to appeal the case at anytime."

Defendant admits that he had a conversation with his attorney relative to an appeal. His testimony is: "A In essence, the best I can remember, the conversation was that there was nothing he could do for me; that acaccording to law he was no longer representing me; that I had no money to pay for an attorney; that if he did represent me it would have to be free gratis; that he didn't think he could do anything for me anyway."

Defendant later testified: "I asked him if he would appeal for me and he told me that he was no longer my attorney of record."

The record does not support defendant's contention that he was denied an appeal. There can be little question, so far as the record can be reconstructed 11 years later, defendant was fully aware of his rights. Defendant concedes that he made no attempt to contact his trial counsel subsequent to their conversation after he was sentenced. We also observe that while defendant now testifies that he sent a note to the warden to see if the legal aid bureau would take his appeal, no attempt was made through the warden or otherwise to contact the court which had appointed counsel for his trial. De-

fendant discussed the possibility of appeal with his trial counsel. Although his counsel was convinced that there was little chance of success, we believe defendant could have had an appeal if at that time he desired one. While it is true that in 1955 there was no way to reimburse his court-appointed counsel for any appellate services, there is no question that if the defendant had requested him to prosecute an appeal, this fact would not have deterred him.

In a post conviction proceeding, petitioner has the burden of establishing a basis for relief. Defendant has not met this burden and his petition was properly dismissed. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DWIGHT EDWIN FAIRCLOTH ET AL., APPELLEES.

148 N. W. 2d 187

Filed February 3, 1967. No. 36385.

1. **Criminal Law: Evidence.** Where circumstantial evidence is relied upon in a criminal prosecution, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion.
2. ———: ———. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. A conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the fact that some unfavorable circumstances are not satisfactorily explained.
3. **Narcotics: Evidence.** To prove unlawful possession of a narcotic drug, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a narcotic.
4. ———: ———. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotic drug at the place where it

was found. But mere presence at a place where a narcotic drug is found is not sufficient.

5. ———: ———. Joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An additional independent factor linking the defendant with the narcotic must be shown.

Appeal from the district court for Deuel County: JOHN H. KUNS, Judge. Exceptions sustained in part, and in part overruled.

Robert E. Richards and Everett O. Richards, for appellant.

William S. Padley, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and WEAVER, District Judge.

BOSLAUGH, J.

The defendants, Dwight Edwin Faircloth, James Allen Oram, and Larry Dale Martin, were charged with unlawful possession and control of narcotics in violation of section 28-452, R. R. S. 1943. At the close of the State's evidence the defendants' motion to dismiss for want of sufficient evidence was sustained by the trial court.

Application was then made to this court by the State, pursuant to section 29-2315.01, R. R. S. 1943, and leave to docket error proceedings was obtained. The State seeks a review of the judgment of the trial court dismissing the prosecution for lack of sufficient evidence. Since the defendants were placed in jeopardy, this proceeding will not affect the judgment of the trial court in any manner. § 29-2316, R. R. S. 1943.

The evidence shows that defendants were apprehended on January 7, 1966, on U. S. Highway No. 30 approximately 1½ miles west of Chappell, Nebraska. They were riding in an automobile which was registered in the name of William Ross. A state patrolman stopped the automobile because the left headlight was out. Fair-

cloth was driving the automobile. Oram was seated on the right side of the front seat with a blue duffle bag "down between his legs." Martin was sleeping in the rear seat. The defendants stated that "they were on the way from California, going to Lincoln, Nebraska to look for work." The patrolman required the defendants to follow him into Chappell so that the ownership of the automobile could be determined.

When apprehended, the defendants' clothing was soiled and disarrayed and it appeared that they had been sleeping in their clothing. They appeared to be under the influence of alcoholic liquor, but there was no odor of alcoholic liquor about them. Their eyes were dull, watery, and bloodshot. The defendants were placed in the county jail at Chappell, Nebraska, but no tests were administered to determine whether the defendants were intoxicated. No body fluids were withdrawn, and the defendants were not examined by a physician.

On the following day, a search warrant was obtained. The "belongings" which were in the front seat, rear seat, and trunk of the car were brought into the sheriff's office and searched in the presence of the defendants. Marihuana was found in the blue duffle bag and in a suitcase which had been taken from the car. Cigarette papers were scattered throughout the car, and were found in the pockets of the clothing of some of the defendants, but no tobacco was found. The record does not identify which of the defendants had cigarette papers in their pockets. Bottles of pills, which are not otherwise described in the record, syringes, cigarette papers, matches, and two knives were also discovered in the duffle bag and suitcase.

The defendants denied any knowledge of the "belongings" taken from the car. The blue duffle bag and suitcase were not produced at the trial. The clothing and other contents of the blue duffle bag and suitcase, except the items previously mentioned, were not produced at the trial and are not described in the record.

On cross-examination, the sheriff was asked if the defendants had stated that they knew the chemical character of the exhibits that had been identified. The sheriff answered that Oram had said that he smoked marihuana and was going to continue to smoke it. The answer was stricken on the motion of the defendants as not responsive, and the sheriff was not questioned further about the statement.

The evidence of the State establishes that marihuana was found in the blue duffle bag and suitcase which were in the automobile in which the defendants were riding. There is very little evidence to connect or identify any particular defendant with the blue duffle bag or suitcase.

Where circumstantial evidence is relied upon in a criminal prosecution, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion. State v. Eberhardt, 176 Neb. 18, 125 N. W. 2d 1.

To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.

A conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the fact that some unfavorable circumstances are not satisfactorily explained. Reyes v. State, *supra*.

Section 28-452, R. R. S. 1943, is a part of the Uniform Narcotic Drug Act which has been adopted in nearly every state. See 9B U. L. A., p. 409. Under this act it

has been generally held that in order to prove unlawful possession, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and of its character as a narcotic. Annotation, 91 A. L. R. 2d, at page 821. A similar rule prevails in this state with respect to unlawful possession of intoxicating liquor. See State v. Eberhardt, *supra.*

Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. People v. Mack, 12 Ill. 2d 151, 145 N. E. 2d 609. But mere presence at a place where a narcotic drug is found is not sufficient. State v. Hunt, 91 Ariz. 149, 370 P. 2d 642; Carroll v. State, 90 Ariz. 411, 368 P. 2d 649. As stated by the Arizona court in State v. Hunt, *supra,* joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An additional independent factor linking the defendant with the narcotic must be shown. See, also, Spataro v. State (Fla. App.), 179 So. 2d 873; Evans v. United States, 257 F. 2d 121.

In this case the evidence shows that Oram had the blue duffle bag containing marihuana between his legs when the automobile was stopped by the patrolman. This circumstance placed the marihuana "within such close juxtaposition" or "easy reach" of the defendant that he could be found to be in possession of it. Hunt v. State, 158 Tex. Cr. 618, 258 S. W. 2d 320; Duran v. People, 145 Colo. 563, 360 P. 2d 132. It was sufficient to permit the jury to have inferred that the marihuana found in the bag was under his possession and control. We think the motion to dismiss made at the close of the State's evidence should have been overruled as to Oram.

As to the other defendants, we believe that the ruling of the trial court on the motion to dismiss was correct.

There was no circumstance, other than their presence in the automobile with Oram on the trip from California, to connect them with his possession of the marihuana.

It is unfortunate that the evidence in this case was not as fully developed as the record suggests it might have been. As sometimes happens, the prosecuting attorney may have been prevented from making a full presentation of the evidence which otherwise appears to have been available. In cases of this nature, where the evidence is usually of a circumstantial nature, it is important that all of the available facts be developed and presented in the trial court.

EXCEPTIONS SUSTAINED IN PART,
AND IN PART OVERRULED.

WEAVER, District Judge, dissenting.

The majority opinion holds that the motion to dismiss should have been overruled as to Oram, and in that I agree. However, it holds that the motion should be sustained as to the other defendants.

While this is a case of first impression in this state, it is, nevertheless, elementary that the opinions and holdings of this court should rest first upon the applicable law of this state and that holdings of other jurisdictions should be secondary.

The majority opinion cites from State v. Hunt, 91 Ariz. 149, 370 P. 2d 642, as follows: "But mere presence at a place where a narcotic drug is found is not sufficient." In that case the defendant had been in the house just before it was searched, but at the time of the search the defendant was in a grocery store some distance away and the only persons in the house were the tenant and two other persons. The facts are entirely different than the instant case, but it should be noted that in that case the court also said: *"Exclusive possession is not required as two or more persons may have joint possession of the drug."* (Emphasis supplied.)

In Carroll v. State, 90 Ariz. 411, 368 P. 2d 649, defendant and another man were sitting on a park bench.

They were searched and released, whereupon they boarded an airplane. The officers then searched the area near the bench and found a package of heroin. The defendant and his companion were taken from the plane. These facts bear no similarity to the case now before this court for consideration.

In Evans v. United States, 257 F. 2d 121, the defendant Mildred Evans occupied an apartment which was frequented by a male acquaintance, William Evans, who was not her husband. At the time of the arrest William had been at the apartment 5 minutes. Twenty-two grains of marihuana were found concealed under the carpet on the top step. *Both Mildred and William disclaimed knowledge or possession of the marihuana, but both defendants were tried on the charge.* Mildred was acquitted. William was convicted and the conviction affirmed. The case supports the theory that the question of the innocence or guilt of all three defendants should be submitted to the jury in the instant case.

It has been said in jest that the Supreme Court corrects the errors of the trial court and perpetuates its own errors. I would urge that this court not perpetuate the holding in State v. Eberhardt, 176 Neb. 18, 125 N. W. 2d 1, cited in the majority opinion. The holding in that case relating to "possession" was based on a series of authorities from other jurisdictions, without any reference whatever to the statutory law of those jurisdictions. It finds no support whatever in Nebraska law and has since then been, in my opinion, repudiated by this court in State v. Stroh, *ante* p. 24, 146 N. W. 2d 756. The Stroh case involved a charge of breaking and entering but also involved the question of who had possession of certain burglary tools, and the opinion reads in part as follows: "But, the evidence does show that the defendant and his two accomplices entered the building together and that *some of them* had possession of the tools admitted in evidence * * *. There is evidence here that the defendant broke into and entered, along

with two companions, the building in question. Even though not identified as having any particular tool in his possession, *the entry into the building at 1:40 a.m. with two companions possessing such tools is sufficient to warrant an inference, under the circumstances, that he had knowledge of and was connected with the actual possession of such tools.* It was relevant to the issue of intent. The above case (referring to a citation by defendant Stroh) also found that there was no proof that the articles found had ever been in the possession of any of the defendants. In this case, the opposite is true since the tools were found in the possession of *either the defendant or his two accomplices.*" (Emphasis supplied.)

The Nebraska law properly applicable to the case now before the court is as follows: "A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto. * * * Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. * * * The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong." State v. Knecht, *ante* p. 149, 147 N. W. 2d 167.

"It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant." State v. Knecht, *supra*. See, also, State v. Martin, 177 Neb. 209, 128 N. W. 2d 583.

"It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime; *and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the*

guilt of the accused, the proof cannot, as a matter of law, be said to have failed." (Emphasis supplied.) State v. Bundy, *ante* p. 160, 147 N. W. 2d 500.

The motions of all three defendants should have been overruled and the matter submitted to the jury for decision.

CARTER, J., joins in this dissent.

NATIONAL BANK OF COMMERCE TRUST AND SAVINGS ASSOCIATION, LINCOLN, NEBRASKA, EXECUTOR OF AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OCTAVIA HEIMER, DECEASED, APPELLEE, V. CROWELL MEMORIAL HOME ET AL., APPELLEES, IMPLEADED WITH N. BERNARD FOUTCH ET AL., APPELLANTS.

148 N. W. 2d 304

Filed February 3, 1967. No. 36393.

1. **Wills.** The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then give that intention effect if not contrary to law.
2. **Charities: Wills.** A charitable gift will not be permitted to fail because of any mistake or ambiguity in describing the intended beneficiary or expressing its purpose if from the language of the bequest when construed in the light of all the facts, the intent of the donor is reasonably apparent.
3. **Wills.** Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if by a reasonable construction it can be avoided.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed as modified.

H. L. Blackledge and Mitchell, Taylor & Beatty, for appellants.

Frederick J. Patz, for appellee National Bank of Commerce Trust & Savings Assn.

Mason, Knudsen, Berkheimer & Endacott, Baumfalk,

Dalke & Dowding, Nelson, Harding, Acklie, Leonard & Tate, and James Hewitt, for appellees Crowell Memorial Home et al.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and LYNCH, District Judge.

MCCOWN, J.

This is an action for the construction and interpretation of a will. The executor, trustee, and charitable beneficiaries are ranged on one side, and two cousins, as heirs-at-law, on the other.

Octavia Heimer died May 25, 1963, and her will was duly admitted to probate on July 2, 1963. The first 13 paragraphs of the will, aside from preliminary recitations and provisions for payment of debts and expenses, contained 11 cash bequests, 4 of them to designated charities in the sum of $1,000 each, and 7 to named individuals all for $500 each. One individual also received a collection of chinaware. Paragraph Thirteenth gave household goods and personal effects in her home to Bernard Foutch, a cousin, and his wife, subject to directions as to selection of various items by other individuals. This was the only provision of the will in which the testatrix made any mention of any of her heirs-at-law.

Paragraphs Fourteenth and Fifteenth are those on which the conflict centers and they provide:

"FOURTEENTH: I give, devise, and bequeath to The National Bank of Commerce, Lincoln, Nebraska, in trust, upon the following terms and conditions, towit: That said Trustee shall hold the principal of said Trust funds intact and the principal thereof shall be invested in good, sound, interest-bearing securities yielding as high a rate of return as may be consistent with reasonable safety, and in the exercise of the judgment of said Trustee it may invest in bonds, preferred stock, or common stocks, which have had a satisfactory record of payment of dividends and is considered by said Trustee to be a sound investment for the purposes herein and

after deducting the usual and customary charge for handling said Trust funds, the remainder of the income therefrom shall be paid to the beneficiaries hereinafter named, in proportion to the amounts set opposite their names, towit:

"(a) To the Gordon Hospital, Gordon, Nebraska, the income of the Trust to be used for the treatment and care of indigent people in said hospital or otherwise as may be determined by the Trustees thereof, in the sum of $10,000.00.

"(b) To the City of Gordon's Good Samaritan Rest Home, Gordon, Nebraska, now in process of construction, the sum of $1000 provided that if the beneficiary of this bequest should be known by any other name which is authorized to accept gifts of this character which qualifies as exempt from inheritance tax, then and in that event the intent is hereby expressed to be that the bequest may be held by the Executor hereinafter named until a proper legal beneficiary can be ascertained.

"(c) To Tabitha Home, Lincoln, Nebraska, or such governing body of Tabitha Home as may be entitled to receive and use bequests, the income of which shall be used for the treatment and care of indigent people, the sum of $5,000.

"(d) To The Cedars Home for Children, 6401 Pioneer Boulevard, Lincoln, Nebraska, the income from which shall be used for the care and treatment of indigent children, the sum of $5,000.

"(e) To The College View Presbyterian Church, or such officers of said Church as may be legally authorized to receive and administer the same, the income from which shall be used by said Church for such religious or charitable purposes as the governing body of said Church shall decide, in the sum of $5,000.

"The said Trustee shall have the power to pool the investments of the aforesaid amounts and pay to each beneficiary the proportionate share of the net earnings, if the Trustee shall desire to do so. The Trust herein

set up shall terminate fifteen years after my death.

"FIFTEENTH: All of the rest, residue, and remainder of my property, real, personal, or mixed, wherever situated, I give, devise, and bequeath to the National Bank of Commerce, Lincoln, Nebraska, in trust upon the same terms and conditions as are stated in the next preceding paragraph of this Will, with instructions and directions to said Trustee to add to the Trust accounts in the same proportion as stated therein, for the use and benefit of the beneficiaries named in said paragraph FOURTEENTH (a), (b), (c), (d), and (e), that is to say, the beneficiaries participating proportionately in this residuary clause are as follows, towit:

"(a) Gordon Hospital, Gordon, Nebraska, 10/25ths,

"(b) Gordon's Good Samaritan Rest Home, Gordon, Nebraska, 5/25ths,

"(c) Tabitha Home, Lincoln, Nebraska, 5/25ths,

"(d) College View Presbyterian Church, Lincoln, Nebraska, 5/25ths.

"said Trustee to retain the principal of said bequests as stated hereinbefore and pay the income therefrom to the aforesaid beneficiaries proportionately, as stated herein."

Paragraph Sixteenth gives a conditional option to two tenants to purchase certain real estate.

Paragraph Seventeenth provides:

"SEVENTEENTH: The Trusts set out in the next two preceding paragraphs of this Will are for the specific purpose of establishing Memorials to my father and mother, George H. Heimer and Anna Heimer, who were pioneer residents of Sheridan County, Nebraska, and for several years residents of the city of Lincoln, Lancaster County, Nebraska; and said Trustee is hereby charged with the responsibility of providing from the interest income from said Trust a suitable bronze placque at the permanent headquarters of each of the beneficiaries in substantially the following form:

" 'To the Glory of God and in memory of George H.

Heimer and Anna Heimer, a permanent Trust Fund is set up by their daughter, Octavia Heimer, to give aid and comfort to those who are unfortunate and needy.' "

The remainder of the will dealt only with disposition of taxes and appointment of executor.

The district court found that the will should be construed; that no trust was created under paragraph Fourteenth for the reason that there is no trust corpus described in paragraph Fourteenth; that the 15-year limitation set forth in paragraph Fourteenth applied only to paragraph Fourteenth and not to the trust created and established by paragraph Fifteenth; that paragraph Fifteenth is a valid residuary clause which established a charitable trust of all the residue; that the income from such trust property should be distributed to the four entities named in the respective fractions designated in paragraph Fifteenth. Two of the heirs-at-law have appealed.

The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then give that intention effect if not contrary to law. See Berning v. National Bank of Commerce Trust & Savings, 176 Neb. 856, 127 N. W. 2d 723.

In reaching this objective, various rules and principles have been used or relied on by courts to support various kinds of reasoning as applied to the particular facts of a given case. "The right to dispose of property by will at death is favored by the law; it is a valuable right which will be sustained whenever possible. It is the policy of the law to uphold devises and bequests and, if possible, to enforce them consistently with rules of law. A will should not be invalidated except for compelling reasons." Brown v. Applegate, 166 Neb. 432, 89 N. W. 2d 233.

The appellants' basic contention is that the will here is so indefinite and uncertain that it is incapable of construction without rewriting the testatrix' will for her, and that, therefore, the indefinite or ambiguous

provisions render them void and require the property to pass by intestacy. We cannot agree.

As stated in 57 Am. Jur., Wills, § 34, p. 59: "The modern tendency, however, is not to hold a will void for uncertainty unless it is absolutely impossible to put a meaning upon it. The duty of the court is to put a fair meaning on the terms used and not, as it is sometimes put, to repose on the easy pillow of saying that the whole is void for uncertainty." While it may be trite, it is still true, that charitable trusts are a favorite of the law. See Allebach v. City of Friend, 118 Neb. 781, 226 N. W. 440.

The rule has been well established in Nebraska that a charitable gift will not be permitted to fail because of any mistake or ambiguity in describing the intended beneficiary or expressing its purpose if from the language of the bequest when construed in the light of all the facts, the intent of the donor is reasonably apparent. See Elliott v. Quinn, 109 Neb. 5, 189 N. W. 173.

There is also a presumption that the testator intended to dispose of his entire estate and not to die intestate either as to the whole or as to any part thereof. Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if by a reasonable construction it can be avoided. See Berning v. National Bank of Commerce Trust & Savings, *supra*.

It is apparent from an examination of the entire will that the testatrix had a specific intent to benefit charities rather than to provide for her heirs-at-law. It is also quite apparent that the testatrix intended to, and did, create two separate sets of charitable trust provisions, and that they are separately stated and set out in paragraphs Fourteenth and Fifteenth. Paragraph Fifteenth specifically applied to all of the residue of her estate, while paragraph Fourteenth was obviously intended to apply only to a separate portion of the estate.

The trial court found that no trust was created under

paragraph Fourteenth for the reason that there was no trust corpus described. While the testatrix did not specifically designate a total corpus or portion of the estate in the initial sentence, she did specify dollar amounts for each charitable beneficiary under paragraph Fourteenth. The trustee was given power to "pool the investments of the aforesaid amounts and pay to each beneficiary the proportionate share of the net earnings, if the Trustee shall desire to do so." We believe the true intention of the testatrix was that the combined total of the specific dollar amounts designated for each individual charity was intended to be the corpus of that trust and that the trust in paragraph Fourteenth would terminate at the end of 15 years, at which time the remaining principal would pass to and become part of the residue.

The reference in paragraph Fifteenth to specifically named charitable beneficiaries, and the individual fractions for each, overrides the alphabetical reference.

Ambiguous, indefinite, or conflicting provisions in a will are always unfortunate, but they do not always make it impossible to determine testamentary intent. Courts often say they will not rewrite a will under the guise of construction or interpretation. If literally applied, this rule would permit construction only when the will did not require it. The point at which provisions are so indefinite and uncertain as to be impossible to construe or interpret under general rules evades precise definition. An ambiguity did exist here and the will required construction. In the light of all the facts, we believe the interpretation made reflects the true testamentary intention of the testatrix.

The trial court's judgment was correct in all respects except as to the finding that there was no trust corpus described upon which the trust in paragraph Fourteenth could operate. The judgment is, therefore, modified by finding that the corpus of the trusts provided for in paragraph Fourteenth was $26,000, the total of the amounts specified for each charitable beneficiary de-

scribed in subparagraphs (a), (b), (c), (d), and (e) of that paragraph; and that upon the termination of 15 years after the date of the death of the testatrix, the remaining principal of such corpus shall pass to and become a part of the residual trust created by paragraph Fifteenth.

As so modified, the judgment of the trial court is affirmed.

AFFIRMED AS MODIFIED.

OTTO KASTANEK, APPELLEE, V. IOLA WILDING, DOING BUSINESS AS CRETE BUICK-PONTIAC COMPANY, CRETE, NEBRASKA, APPELLANT.

148 N. W. 2d 201

Filed February 3, 1967. No. 36397.

1. **Workmen's Compensation.** Awards for workmen's compensation cannot be based on speculation or conjectural evidence, but must be based on sufficient evidence showing that the disability was the result of an accident arising out of and in the course of the employment.
2. ———. The burden of proof in a workmen's compensation case is on the plaintiff to prove an accident arising out of and in the course of the employment.
3. ———. A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment, and where causation is not established by a preponderance of the evidence the plaintiff cannot recover.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. Reversed and dismissed.

Kier, Cobb & Luedtke and Frederick L. Swartz, for appellant.

Jack L. Craven, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and WEAVER, District Judge.

CARTER, J.

This is an action by Otto Kastanek for the recovery of benefits under the Nebraska Workmen's Compensation Act. The trial court found for the plaintiff and defendant has appealed.

Plaintiff was employed by Iola Wilding, who operates a garage in Crete, Nebraska, under the name of Crete Buick-Pontiac Company. On January 18, 1964, the date of the alleged accident, plaintiff was employed by the defendant as a garage mechanic at a salary of $100 per week. The claim was filed with the Nebraska Workmen's Compensation Court and was denied by a single judge of that court. A hearing before the full court was waived and an appeal taken to the district court. A trial de novo was had in the district court after which an award was made to the plaintiff from which this appeal was taken to this court.

On the morning of January 18, 1964, plaintiff was engaged in installing a crankshaft in a Pontiac automobile assisted by Steve Pomajzl, a fellow employee. Pomajzl was holding the flywheel underneath while plaintiff was using a torque wrench to tighten the pulley to a pull of 150 pounds. In so doing, he leaned over the fender and pulled on the wrench to achieve the desired result. When he straightened up, and not before, he felt a sharp pain in his lower back which subsided almost immediately. He said nothing at the time to Pomajzl or anyone else. He was not working in the afternoon, the day being Saturday, and he drove out in the country to visit his brother. When he later attempted to arise from a chair in his brother's home, he again felt a sharp pain which continued to such an extent that he went home and went to bed. He remained in bed the next day, a Sunday, and on Monday morning notified Iola Wilding that he was unable to come to work. He told Iola Wilding at that time that he was unable to get around and that it happened from the torquing of the pulley on the previous Saturday morning.

On Monday morning he went to the office of Dr. Robert E. Quick. Dr. Quick testified that his notes indicated no history of an accident but he had a personal recollection of a conversation about torquing a pulley while plaintiff was working. Dr. Quick diagnosed the case as a sprain, as he said they usually are, or a disc disease or slipped disc. He took X-rays and prescribed rest, muscle relaxants, and ultrasonic treatments. There being little improvement during the following week, he advised hospital care. On January 27, 1964, plaintiff entered the Veterans Hospital at Lincoln, Nebraska, where he remained for 25 days before being discharged. The Veterans Hospital records show the following: Plaintiff complained of low back pain, the duration of which had been about 1 week before admission. The record then stated: "There was no history of injury but the Saturday before admission the patient, while doing nothing, noticed onset of low back pain which grew worse by Sunday." He was placed in traction, given physiotherapy, heat, massage, and analgesia muscle relaxants. He wore a brace when up and around, and was wearing a brace at the time of trial.

On April 28, 1964, he gave a statement to an insurance representative. In describing the accident in the statement, he said: "Mr. Steve Pomajzl was assisting me by holding the fly wheel. I did not experience any pain at the time." On cross-examination he was asked if he made the quoted statement as follows: "Q 'I did not experience any pain at the time,' did you tell him that? A Yes. Q And was that the truth? A Yes."

Dr. Quick was the only physician who testified. He stated that he diagnosed the case as showing a limitation of the range and motion of the back, a muscle spasm of the lumbar vertebrae, tenderness over the right lower portion of the back, and abnormal modularity of the subcutaneous tissue, which could be caused by wrenching. A signed statement by Dr. Quick in the Veterans Hospital records shows his diagnosis as follows: "1.

Sacro-iliac and lumbar strain 2. possible early herniated nucleus pulposis, without radiation."

The evidence shows that at the hearing before the Workmen's Compensation Court on March 15, 1965, the plaintiff testified that he gave no history of an injury while at work and stated that nothing happened to him—that it just came on. He gave a signed statement to an insurance representative in which he stated that he did not experience pain at the time he was torquing the pulley with the help of Pomajzl. He states that he gave a history of his ailment when he entered the Veterans Hospital. The records of the hospital show no history of the injury other than that the pain came on the Saturday previous while he was doing nothing. He does not deny the truth of the latter statement. On cross-examination, he states that his evidence in the Workmen's Compensation Court and his written statement given to the insurance representative are true.

Plaintiff's evidence in the district court is that he felt a sharp pain for a couple of seconds when, and not before, he straightened up after torquing the pulley. He told no one and he admittedly manifested no evidence of injury. The evidence of the only physician who testified is that the condition described could have been caused by a wrenching of the back. Such evidence, impeached as shown, is not sufficient to sustain the burden of proof that he suffered an accident arising out of and in the course of his employment. See Carranza v. Payne-Larson Furniture Co., 165 Neb. 352, 85 N. W. 2d 694.

"On the question of the burden of proof this court has said: 'The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking.'" Spangler v. Terry Carpenter, Inc., 177 Neb. 740, 131 N.

W. 2d 159. See, also, Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405.

It is the contention of the plaintiff that the evidence of Dr. Quick is sufficient corroboration of the plaintiff to sustain the burden of proof irrespective of plaintiff's admissions of inconsistent statements heretofore recited. It is the position of plaintiff that the testimony of Dr. Quick shows a causal connection between the injury and the torquing of the pulley. The effect of Dr. Quick's testimony is that his condition could have been caused by a wrenching of the back. Dr. Quick did not say, nor give it as his opinion, that the torquing of the pulley caused the back condition that he found existed. It is a well-known fact that such conditions, including the herniation of discs, have many causes with and without trauma. Consequently a mere statement that a wrenching of the back could have caused the injury does not of itself establish causation. McCauley v. Harris, 164 Neb. 216, 82 N. W. 2d 30.

The evidence, coupled with the history and circumstances of the case, convinces us that the plaintiff failed to show by a preponderance of the evidence that the injury to the plaintiff arose out of and in the course of his employment. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLANT, V. LORRAINE RANSBURG ET AL., APPELLEES.

148 N. W. 2d 324

Filed February 10, 1967. No. 36316.

1. **Criminal Law.** Where a person has no previous intent or no previous purpose to violate the law, but does so only because persuaded or induced to commit the act by law enforcement agents, he is entitled to the defense of unlawful entrapment because the law, as a matter of policy, forbids a conviction. On the other hand, where a person already has the readiness or

willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity for such violation or merely seeks to collect evidence of the offense does not constitute unlawful entrapment.

2. ———. The mere fact that artifice or stratagem may be employed to apprehend those engaged in criminal activity does not in and of itself give rise to the defense of entrapment.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Exceptions sustained.

Herbert M. Fitle, Charles A. Fryzek, John B. Abbott, John A. Gutowski, Raymond E. Gaines, Richard L. Dunning, and Gary P. Bucchino, for appellant.

Paul E. Watts, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

BOYLES, District Judge.

This is a proceeding for review under the provisions of section 29-2315.01, R. R. S. 1943. It was instituted by the county attorney of the County of Douglas, Nebraska, following the dismissal of separate prostitution complaints against each defendant and discharge of the accused by the district court for the County of Douglas. The original complaints were filed under ordinances of the city of Omaha and tried by the district court, on appeal from the municipal court, without a jury. The defense of entrapment was sustained. The State contends that the judgment of the trial court was contrary to both the law and the evidence.

There is no significant dispute in the facts. One Prescher, a police officer, obtained a room at an Omaha motel. Prescher then telephoned the Ritz Cab Company and told an unidentified person who answered that he wanted to "arrange for some company." This call was apparently referred by the recipient to the defendant Anthony, a cab driver. Anthony subsequently phoned Prescher and received the same request. Anthony then arranged to meet Prescher, and a conversation ensued

in which the age and color of the "company" was discussed. Prescher was then taken to an Omaha address and introduced to the defendant Ransburg. Prescher told Miss Ransburg he was looking for "some fun." Ransburg replied that she charged $30 for "a straight lay" and would not engage in oral copulation. This is the first instance in which the record discloses any actual mention of a criminal act.

Prescher and Ransburg were then driven by Anthony to the motel, stopping to buy liquor enroute. Prescher paid the cab fare and Anthony asked for and received an additional sum for "making the arrangements."

Upon arrival at the motel room, the defendant Ransburg asked for money and, being unable to make change, offered to perform other acts of intercourse for an additional price. When the defendant began to disrobe, Prescher revealed his identity and made the arrest. The defendant Anthony was recalled to the scene by a representation that Prescher and Ransburg could not agree upon a price, and was arrested upon his arrival.

The record nowhere discloses any overt act or word by Prescher from which overpersuasion, undue pressure, or coercion may be inferred; neither does it disclose any reluctance or unwillingness on the part of either defendant to commit the offense alleged. No relevant misrepresentation was made by Prescher, save only that concerning his identity. It is patent, from all the testimony, that both of the accused appeared on the scene willing and expecting to participate in the unlawful act and expecting a reward therefrom. At the most, the actions of Prescher presented only an opportunity for the defendants to engage in unlawful activity, if they so intended and desired.

We hold that the exceptions of the State should be sustained.

Facts constituting entrapment, which is in the nature of an affirmative defense, are ordinarily to be determined by the jury or trier of fact in each individual

case, and its findings will be disturbed only when the preponderance of evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law.

The cases uniformly hold that where a person has no previous intent or no previous purpose to violate the law, but does so only because persuaded or induced to commit the act by law enforcement agents, he is entitled to the defense of unlawful entrapment because the law, as a matter of policy, forbids a conviction. On the other hand, where a person already has the readiness or willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity for such violation or merely seeks to collect evidence of the offense does not constitute unlawful entrapment and is no defense. Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249; Sherman v. United States, 356 U. S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848.

Likewise, the mere fact that artifice or stratagem may be employed to apprehend those engaged in criminal activity does not in and of itself give rise to the defense. United States v. Thompson, 366 F. 2d 167 (F.B.I. set up opportunity to pay and receive "kickback"); Osborn v. United States, 385 U. S. 323, 87 S. Ct. 429, 17 L. Ed. 2d 394 (secret federal agent elicits offer to bribe a juror); Rogers v. United States, 367 F. 2d 998 (solicitation of illegal sale of wild game by conservation agent concealing identity).

Chief Justice Hughes, in the Sorrells case, citing Grimm v. United States, 156 U. S. 604, 15 S. Ct. 470, 39 L. Ed. 550, and others, stated the rationale of the rule, as follows: "The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A

different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

We think the facts and law applicable here fall well within the scope of the cases cited. Under the terms of the statute, we can not now alter the disposition of the case made by the trial court, and this opinion is therefore only advisory.

EXCEPTIONS SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD EUGENE HUFFMAN, APPELLANT.

148 N. W. 2d 321

Filed February 10, 1967. No. 36349.

1. **Indictments and Informations.** An information must (1) inform the accused of the nature and cause of the accusation and (2) be reasonably definite as part of the prospective record for a defense of double jeopardy.
2. **Searches and Seizures: Arrest.** A search during informal detention of a person may be reasonable, although it is made under circumstances that would not justify custody in the tradition of arrest.
3. **Evidence.** A ruling admitting an exhibit in evidence over objection to authentication will not be overturned except for a clear abuse of discretion.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Luebs, Tracy & Huebner and Bruce H. Schoumacher, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ.

SMITH, J.

A jury found defendant guilty of breaking and entering with intent to steal. The district court sentenced him as a recidivist to 15 years imprisonment, and he has appealed. Some of his contentions are as follows: (1) The information was vague in alleging location of the crime. (2) Physical things were received in evidence over two objections: (a) The articles had beeen seized by law enforcement officers in an unreasonable search, and (b) the foundation for admission was insufficient in respect to official custody. (3) The recidivist statute is unconstitutional, and the sentence is otherwise excessive.

The information charged a break and entry into "a building occupied by Hornaday Manufacturing" in the County of Hall, Nebraska. Although it alleged a crime, jurisdiction, and venue, more was required. An accused possesses a right to be informed of the nature and cause of the accusation against him. An information must also be reasonably definite as part of the prospective record for a defense of double jeopardy. Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

The sufficiency of an information may vary with the locality. We notice that Hall County is 540 square miles in area and that its population in 1960 was 35,757. A charge of break and entry into a kitchen occupied by John Smith in the County of Los Angeles would be glaringly vague. In contrast the charge against defendant was adequate.

Defendant moved to suppress the use of bricks, ammunition, and a rifle as evidence, alleging an unreasonable search and seizure. The motion was denied at a pretrial hearing, and at the trial the articles were admitted in evidence over renewed objection. In reviewing the rulings we consider all the evidence, at the trial as well as at the hearing on the motion. See, Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790; Rent v. United States, 209 F. 2d 893; State v.

Randall, 94 Ariz. 417, 385 P. 2d 709; People v. La Bostrie, 14 Ill. 2d 617, 153 N. E. 2d 570.

At 1:30 Sunday morning, February 6, 1966, patrolman Grossoehme of the Nebraska Safety Patrol saw an automobile on the Hornady premises. Two persons were sitting in the front seat of what appeared to be a brown Buick model of 1955 or 1956. The Buick moved along the private driveway and into a public road.

At 2:09 the same morning deputy sheriff Piel discovered a shattered window of the Hornady building. Looking inside, he saw broken glass that had enclosed cases for display of rifles. When he entered the building, he saw in the lobby three small pieces of brick and in the display cases brick dust. The company owner and Grossoehme having arrived, the Grand Island police were notified of the break-in, the missing rifles, and the Buick, which was described.

At 2:45 a.m., officer Kelly, a Grand Island policeman, saw an automobile that fitted the broadcast description. When he turned his red flasher on, the Buick stopped. The driver got out, walked back to the squad car, and identified himself as James Lindhardt, owner of the Buick. The passenger on request also got out and identified himself as Harold Huffman, the defendant. Kelly asked them whether they would mind waiting until officers who were on the way arrived. Defendant and Lindhardt had no objection.

Piel came upon the scene shortly before 3 a.m. Shining his flashlight through a window of the Buick, he saw inside a block of brick and a rifle with brick dust which he mistook for rust. Lindhardt in answering a question said that a friend had lent the rifle to him. On request he handed over the rifle and the block. Responding to an inquiry about ammunition, he opened the glove compartment, removed four boxes of ammunition, and handed over the boxes. No officer had entered the Buick up to that time.

Defendant argues that he was arrested without prob-

able cause when Kelly stopped the Buick. Informal detention is permissible in spite of a lack of probable cause for custody in the tradition of arrest. See, § 29-829, R. S. Supp., 1965; Rodgers v. United States, 362 F. 2d 358; Wilson v. Porter, 361 F. 2d 412; Nicholson v. United States, 355 F. 2d 80; United States v. Vita, 294 F. 2d 524; People v. Mickelson, 59 Cal. 2d 448, 380 P. 2d 658; People v. Peters, 18 N. Y. 2d 238, 219 N. E. 2d 595. The interference with defendant's freedom of movement was lawful, and the officers geared their actions to the state of their knowledge. The search was reasonable.

During a 10-day period official custody of the rifle and some outer clothing taken from defendant and Lindhardt was unusual for authentication. The articles were kept by the sheriff in an unlocked room. They were accessible to employees, to janitors, and at times even to prisoners and visitors. Nothing else, however, supports a permissible inference that anybody tampered with the objects. Piel testified that the condition of the exhibits at the time of initial custody and at the time of trial was substantially the same. Their condition formed a basis for scientific opinion. An expert testified that the block and pieces of brick had similar physical characteristics and that they might have come from the same clay pit. In his opinion brick particles on the rifle and in the clothing were the color type of the block and pieces.

Under the circumstances each exhibit was inadmissible in evidence without authentication in a specific manner. In order for its subsequent condition to be evidential of its prior condition, proof of substantial identity was necessary. Important in such situations are the nature of the exhibit, the circumstances surrounding preservation and custody, and the likelihood of intermeddlers tampering with the object. If substantial identity of one condition with the other condition is reasonably probable, the trial court may receive the exhibit

in evidence. The ruling will not be overturned except for a clear abuse of discretion. See, Brewer v. United States, 353 F. 2d 260; McCormick on Evidence, § 179, note 3, p. 384. Although the precautions taken by the sheriff win no plaudits, reception of the exhibits in evidence was not a clear abuse of discretion.

The sentence was within the discretion of the district court. The contention that the recidivist statute, section 29-2221, R. R. S. 1943, violates constitutional guaranties of due process and equal protection is not persuasive. See, State v. Konvalin, 179 Neb. 95, 136 N. W. 2d 227; Poppe v. State, 155 Neb. 527, 52 N. W. 2d 422; Rains v. State, 142 Neb. 284, 5 N. W. 2d 887; Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82.

Other assignments of error fail to show reversible error. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY SHELDON, APPELLANT.

148 N. W. 2d 301

Filed February 10, 1967. No. 36407.

Criminal Law. The post conviction remedy is not available for reconsideration of matters that were determined by this court, unless a miscarriage of justice is shown.

Appeal from the district court for Butler County: JOHN D. ZEILINGER, Judge. Affirmed.

Edgar V. Thomas, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ.

SMITH, J.

Defendant moved under the Post Conviction Act to

vacate convictions and sentences for burglary and possession of burglar's tools. The district court overruled the motion, and defendant has appealed.

Defendant contends that he was denied counsel at the preliminary hearing and that the sentences were excessive. These issues were determined adversely to him on direct appeal in State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428. Unless a miscarriage of justice is shown, the post conviction remedy is not available for reconsideration of matters that were determined by this court. State v. Parker, 180 Neb. 707, 144 N. W. 2d 525.

The judgment is affirmed.

AFFIRMED.

LARRY LUND ET AL., APPELLEES, V. CLAIR W. ORR ET AL., APPELLANTS.

148 N. W. 2d 309

Filed February 10, 1967. No. 36427.

1. **Covenants.** Restrictions as to the erection or use of buildings will be construed, if possible, so as to effectuate the intention of the parties.
2. ———. Where the original purpose and intention of the parties who created the restriction, pursuant to a general scheme, has been destroyed by a change of condition of the surrounding neighborhood, and the restriction is no longer a substantial benefit to the residents, the restriction will not be enforced.
3. ———. A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.
4. ———. The benefit which is to be received from a restrictive covenant of the nature involved in this case has reference to the physical use or enjoyment of the land protected by the covenant.

Appeal from the district court for Dakota County: JOHN E. NEWTON, Judge. Affirmed.

Smith, Smith & Boyd and Cecil W. Orton, for appellants.

Ryan & Scoville, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and McCOWN, JJ., and KOKJER, District Judge.

BOSLAUGH, J.

This is an action to remove a restrictive covenant upon real estate. The trial court found that the restriction should be removed and canceled. The defendants appeal.

The plaintiffs, Larry Lund and Donna Lund, are the owners of a small tract of land, having an area of approximately 1 acre, located about one-half mile north of Dakota City, Nebraska. The plaintiffs' land is near the northeast corner of the southwest quarter of Section 4, Township 28 North, Range 9 East of the 6th P.M., in Dakota County, Nebraska, and is adjacent to the right-of-way of U. S. Highway No. 77 which runs along the east boundary of the property. A county road runs along the north edge of the property. The plaintiff, Ernest E. Rozell, Jr., is the contract purchaser of the 1-acre tract.

The defendants, Clair W. Orr and Lucille Orr, formerly owned the entire southwest quarter of Section 4 subject to certain easements and rights-of-way. In June 1964, they conveyed the 1-acre tract to the Lunds by a warranty deed which contained this provision: "Grantees, by accepting this deed, agree to use said tract solely as a residential lot and violation or attempting to violate this provision shall not affect the title to said tract, but an action may be maintained by grantors or any adjoining owner to either restrain violation or recover damages."

In December 1964, the Orrs conveyed the rest of the southwest quarter of Section 4 without restriction to

the defendant, So Soo Development, Inc. In July 1965, So Soo Development, Inc., conveyed the property to the defendant, County of Dakota, Nebraska. The property is now leased to the defendant, Iowa Beef Packers, Inc., and an $8,500,000 plant has been constructed upon the premises for the slaughter of cattle and the processing of beef. In 1965, the property was designated an industrial area under Chapter 19, article 25, R. R. S. 1943.

At the time the Lunds purchased the 1-acre tract, the Orr property was used for farming. The land to the north was used for raising and storing potatoes. The land to the east was used as a farm and for cattle feeding. There has been no change in the use of the land to the north and to the east. There has been no construction upon the 1-acre tract and there is evidence that it is not now suitable for residential use.

The plaintiffs' theory of the case is that there has been a change in conditions and that the 1-acre tract is no longer suitable for residential use. Restrictions as to the erection or use of buildings will be construed, if possible, so as to effectuate the intention of the parties. Hogue v. Dreesen, 161 Neb. 268, 73 N. W. 2d 159. Where the original purpose and intention of the parties who created the restriction, pursuant to a general scheme, has been destroyed by a change of condition of the surrounding neighborhood, and the restriction is no longer a substantial benefit to the residents, the restriction will not be enforced. Reed v. Williamson, 164 Neb. 99, 82 N. W. 2d 18.

A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property. Hogue v. Dreesen, *supra.*

There is no direct evidence as to the purpose of the restriction which was imposed upon the 1-acre tract involved in this case. Lund testified that he intended to use the 1-acre tract for residential purposes at the time he purchased it. The plaintiffs offered to prove that the grantor had explained at the time of the transaction that it was his intention to sell other tracts of land along U. S. Highway No. 77 for residential purposes and that such sales would be hampered unless a restriction was imposed upon the 1-acre tract.

There is nothing in the evidence to indicate that at the time of the sale of the 1-acre tract to the Lunds, the Orrs contemplated any use other than agricultural or residential for their property. The location and character of the land, and the surrounding circumstances, indicates that the purpose of the restriction was to permit and facilitate residential development upon other parts of the Orr land.

The sale of the entire remaining tract 6 months later for the construction and development of a large packing plant was an abandonment of any plan for residential development upon the Orr land. The original purpose and intention of the parties has been destroyed and there is no longer any substantial benefit to the remaining land.

The defendants argue that they will be damaged by the cancellation of the restriction imposed upon the 1-acre tract. They suggest the possibility that the 1-acre tract might be devoted to some undesirable business if the restriction were removed.

The benefit which the defendants were entitled to receive from the restrictive covenant had reference to the physical use or enjoyment of the land possessed by them. See Price v. Anderson, 358 Pa. 209, 56 A. 2d 215, 2 A. L. R. 2d 593. A nonresidential use of the 1-acre tract will not interfere with the defendants' use of their land for the industrial purposes to which it is now devoted. It is this change in the use of the defendants'

land that entitles the plaintiffs to relief from the restriction.

The defendants point out that the sale to Rozell took place after the sale to So Soo Development, Inc., and at about the time that the construction of the packing plant commenced. This is a circumstance which weakens the plaintiffs' case but it is not a complete defense to the action. If the restriction could be enforced against Rozell, it would be valid as against all future owners, and the use of the 1-acre tract would be restricted to a use which is not suitable or desirable because of the use which is now made of the rest of the property.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

FRED MASER ET AL., APPELLEES, V. RAY V. LIND ET AL., APPELLANTS.

148 N. W. 2d 831

Filed February 17, 1967. No. 36363.

1. **Vendor and Purchaser: Fraud.** It is not necessary that parties must have discussed or considered subject of termites before purchaser may predicate fraud upon representation of vendor that buildings are in good, sound condition when, in fact, they are infested by termites.
2. **Fraud.** An action for fraud will not lie where exercise of ordinary prudence will prevent deception, but the rule has no application where the alleged fraud relates to latent damaged condition of buildings not discoverable by exercise of ordinary prudence.
3. **Vendor and Purchaser: Fraud.** Where one unfamiliar with termites examines buildings and, without fault on his part, is unable to and does not discover termite infestation, he is entitled to purchase in reliance upon representation by vendor that buildings are in good, sound condition.
4. **Fraud.** The good faith of persons making false statements is immaterial.
5. ———. A misrepresentation of the condition of buildings is

not always remedial and may constitute a mere expression of opinion, depending upon circumstances; but may be actionable if made and relied upon as a positive statement of an existing fact where purchaser by the exercise of ordinary prudence is unable to discover the true damaged condition.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Kier, Cobb & Luedtke, for appellants.

Joseph J. Cariotto, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and POLLOCK, District Judge.

POLLOCK, District Judge.

The purchasers of real estate sued the vendors to recover damages for fraud, claiming reliance upon their representation that the buildings were "in good sound condition" when, in fact, they were seriously damaged by termites. The verdict of the jury was for the plaintiffs in the amount of $3,143 and defendants appeal.

The plaintiffs Fred Maser and Helen F. Maser are husband and wife and the defendants, Ray V. Lind and Ralph F. Lind are brothers. Involved is real estate described as Lots 11 and 12, Block 5, Second East Park Addition to the City of Lincoln. The buildings consisted of a "large house" with apartments, a "small house," and a garage.

Plaintiffs had lived about 3 blocks away. Fred Maser testified that he had never encountered termites, had not known what a termite was, and had never heard of a termite. Before dealing with defendants he was employed in the manufacture of telephone switches. At the time of the trial he was 49 years of age.

Defendants showed plaintiffs through the houses on two occasions, one of them consuming as much as an hour and a quarter to an hour and a half. Defendants said they had put a new floor in the kitchen and bathroom of the small house. The reason was not discussed.

Plaintiffs met with defendant Ray V. Lind on May 25, 1960. Maser testified that Lind made the statement: "Well, those are good, sound buildings and they will make you a good investment." Maser said he believed and relied upon this representation of the condition of the buildings. Lind denied that he said anything about their condition. The parties orally agreed, plaintiffs to purchase and defendants to sell, for $16,250. Plaintiffs paid $250 earnest money. On June 3, 1960, they paid the remaining $16,000 and received a warranty deed.

The premises were never advertised for sale. No real estate broker participated in the transaction. No attorney examined the title or advised plaintiffs. No termite inspection was required. There was no mention of termites.

Maser discovered termites in July when he cut a hole in the bathroom floor of a downstairs apartment to enable a plumber to repair a leak under the bathtub.

Douglas P. Hayes testified that he was branch manager of an exterminating company, and had 10½ years of training and experience. He said that at the request of Maser he inspected both houses on July 11, 1960, and that both were seriously damaged as a result of general termite infestation. This was 38 days after plaintiffs took title, 47 days after they orally agreed to purchase. Maser did not discover termites for more than a month after plaintiffs took possession.

In the opinion of Hayes, there had been termites in both houses for several years. He described in detail the places and degree of damage from the infestation. His findings are corroborated by photographs and are undisputed.

The defendants testified that they did not know there were termites in the houses.

Donald Beaman testified that he lived in a house he built on a lot he purchased from the mother of the defendants, that it was across the street from the large house, that some years ago he had experience with ter-

mites in another part of Lincoln, and that there had been termites in the new garage at the house where he lives.

Beaman testified that on a Sunday afternoon after the death of the mother of defendants, which was on March 12, 1960, Ralph Lind and the tenant in the small house were cleaning out the basement of the large house, that he was called over and asked whether the city dump was open on Sunday afternoon, that he observed termites in wooden boards and paper boxes they were carrying out, and that they were all eaten up by termites. This was denied by defendants.

The defendants urge that because the subject of termites was not discussed or considered by the parties, fraud may not be predicated thereon. We decided this question in Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131. It was an action in equity to rescind a contract for the purchase of a Kearney motel where the vendors represented that it was in good or excellent condition when, in fact, it was infested by termites. The trial court denied plaintiffs relief, and granted specific performance of the contract on the cross-petition. We reversed the judgment and remanded the cause, holding that plaintiffs, although not entitled to rescission by reason of laches, were entitled to amend their petition and claim damages.

The vendors in the Russo case were executors of the estate of the deceased owner, and exercised testamentary power to sell. One executor, a brother, was a North Dakota rancher. The other, a sister, was a 75-year-old widow living in Fairbury, Nebraska. Neither was familiar with the premises sold. We quote from the opinion: "Termites seem to work in places where they are not easily observed and apparently it takes somewhat of an expert to discover their presence unless they are discovered by chance or have advanced to the stage of destruction where the damage itself makes their presence known. We do not think such was the situation

here at or before the time of the sale. It would appear that neither the appellants nor the executors had any knowledge of or ever had any experience with termites. They would apparently not have recognized them even if they had seen them. During the course of their negotiations, which led to the agreement, we find none of the parties thereto became aware of the presence of termites in the motel property. * * *

"On the four trips appellants made to the motel immediately preceding the 20th of March, when the contract was entered into, we find they had the opportunity to and did fully examine and inspect the motel property. However, nothing was ever said about termites on these occasions. Does this fact prevent them from now saying they relied on the representation made as to its condition? * * *

"The executors represented the motel property to be in good condition when, in fact, it was in a damaged condition because it contained termites. Under these circumstances specific performance of the contract would be unjust and the trial court was in error in granting it.

"Appellants are entitled to some form of relief in this proceeding because of the damaged condition of the motel * * *."

The subject of termites was not discussed or considered by the parties, and we held that plaintiffs were entitled to predicate fraud upon the representation that the buildings were in good condition.

Where ordinary prudence would prevent deception, an action for fraud perpetrated by deception will not lie, but this rule has no application where the defects are latent. Falkner v. Sacks Bros., 149 Neb. 121, 30 N. W. 2d 572. Termite infestation is a latent condition not easily discoverable by persons unfamiliar with termites.

It is the undisputed evidence that Maser was unfamiliar with termites. He made an ordinary examination of most parts of both houses, including the basement and the first and second floor of each house. No condition

of which he now complains was discernible by him. Without any fault on his part, he was unable to discover the latent damaged condition resulting from termite infestation. Under these circumstances he was entitled to purchase in reliance upon the representation of the good, sound condition of the buildings.

Russo v. Williams, *supra,* states: "Also, as stated in Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139, by quoting from 23 Am. Jur., Fraud and Deceit, § 144, p. 945: 'The mere fact that one makes an independent investigation or examination, or consults with others, does not necessarily show that he relies on his own judgment or on the information so gained, rather than on the presumption of law to that effect. If under the circumstances, he is unable to learn the truth from such examination or investigation or, without fault on his part, does not learn it and in fact relies on the representations, he is entitled to relief, all other ingredients being present.'

"If the defects are concealed, such as here, we have said: 'These defects were latent. * * *'

"We do not think, because of the nature of termites, that the inspection and examination made by appellants before entering into the contract now prevents or estops them from saying they relied on the representation that the property was in good condition. It is apparent none of the parties observed anything that in any way made them suspicious."

A misrepresentation of the condition of buildings is not always remedial, and may constitute a mere expression of opinion upon which a purchaser may not rely, depending upon the circumstances of the particular case. Such a misrepresentation may be actionable if made and relied upon as a positive statement of an existing fact where the purchaser by the exercise of ordinary prudence is unable to discover the true damaged condition.

The defendants urge that they are not liable for a misrepresentation relating to a latent condition when

they were reasonably familiar with the premises and were not shown to have made a misrepresentation with knowledge of its falsity. Impliedly, they would excuse any misrepresentation if made innocently with honest belief of its truth.

Defendants claim that Lind was reasonably familiar with the premises sold and "had a right to make such a statement" of their condition. They argue that if "latent defects can be the subject of fraud when a person is in a position to know or be reasonably familiar with the premises, then no seller could be safe in giving any sales talk whatsoever about the condition of the premises."

We have consistently held that proof of scienter is unnecessary, a misrepresentation being actionable even though made innocently and with honest belief of its truth.

We again quote from Russo v. Williams, *supra:* "As early as Phillips v. Jones, 12 Neb. 213, 10 N. W. 708, this court held: 'And if a party, without knowing whether his statements are true or not, makes an assertion as to any particular matter upon which the other party has relied, the party defrauded in a proper case will be entitled to relief.'

"And in Newberg v. Chicago, B. & Q. R.R. Co., 120 Neb. 171, 231 N. W. 766, we said: 'This court was early committed to the doctrine: "Whether in an action for damages for false representations it is necessary either to aver or prove the scienter, the authorities do not agree. The better rule, and the one adopted by this court, is that the intent or good faith of the person making false statements is not in issue in such a case."' * * *

"As stated in Peterson v. Schaberg, 116 Neb. 346, 217 N. W. 586: 'An instruction to a jury in an action for damages for false representation, which states in substance or in language naturally understood by a jury to mean that the defendant is not responsible for a mis-

statement of fact if made in good faith, is erroneous.' "

We have examined the record and conclude that the case was fairly tried and submitted. The judgment is affirmed.

AFFIRMED.

IN RE TRANSFER OF LAND FROM THE SCHOOL DISTRICT OF WAKEFIELD.

MARY ALICE JOHNSON, APPELLEE, V. SCHOOL DISTRICT OF WAKEFIELD IN DIXON, WAYNE, AND THURSTON COUNTIES, NEBRASKA, A PUBLIC CORPORATION, ET AL., APPELLANTS.

148 N. W. 2d 592

Filed February 17, 1967. No. 36429.

1. **Statutes.** In the interpretation or construction of statutes, ascertainment of the intention of the Legislature is the end or purpose to be accomplished.
2. ———. In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purposes rather than one which will defeat it.
3. ———. It is the office and function of a proviso contained in a statute to limit and qualify the preceding language of the statute and not to enlarge its effect.
4. ———. The office of a proviso in a statute is generally either to except something from the enacting clause or to qualify or restrain its generality or to exclude some possible ground of misrepresentation of the statute, as extending to cases not intended by the Legislature to be brought within its purview, and not to confer a power or enlarge the enactment to which it is appended so as to operate as a substantive enactment itself.
5. **Schools and School Districts.** The proviso contained in subsection (1)(d) of section 79-403, R. S. Supp., 1963, providing "that they have personally paid tuition for one or more of their children to attend school in the other district over a period of two or more consecutive years," does not provide an independent and sole ground for transferring land from one school district to another.

Appeal from the district court for Wayne County:

GEORGE W. DITTRICK, Judge. Reversed and remanded with directions.

Harry N. Larson, for appellants.

Addison & Addison, for appellee.

Person & Dier, for amicus curiae.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

CARTER, J.

This is an action involving a transfer of land from the Wakefield School District to the Wayne School District. The trial court found that the transfer was in accordance with section 79-403, R. S. Supp., 1963. Certain resident taxpayers and voters in the districts involved, who were parties to the action, appealed to this court.

The record shows that the Wakefield School District is located in Dixon, Wayne, and Thurston Counties and that the county superintendents, county clerks, and county treasurers constitute a board to hear and determine applications for the transfer of lands from one school district to another across county lines in accordance with section 79-403, R. S. Supp., 1963. In August 1965, Mary Alice Johnson filed her application with said board seeking the transfer of the southwest quarter and the south half of the southeast quarter of Section 12, Township 26 North, Range 4 East of the 6th P.M., Wayne County, Nebraska, from the Wakefield School District to the Wayne School District. Notice and hearing was accorded the parties. Thereafter on September 8, 1965, the board granted the application. An appeal was taken to the district court for the County of Wayne which, after a trial, affirmed the action of the board. An appeal was taken from the judgment of the district court, which appeal is the subject of the instant case in this court.

The record shows that the trial court sustained a motion to dismiss the appeal of the Wakefield School District for the reason that it was not a proper party. The motion to dismiss was overruled as to the school board members of the Wakefield School District and the resident taxpayers and voters joined in the action. The dismissal of the Wakefield School District from the action is assigned as error. This assignment of error is not well taken on the holdings in Board of Education v. Winne, 177 Neb. 431, 129 N. W. 2d 255, and Hinze v. School Dist. No. 34, 179 Neb. 69, 136 N. W. 2d 434.

The land requested to be transferred is owned by Mary Alice Johnson, the plaintiff, who is a resident of Powell, Wyoming. Glen Olson and his family occupy the land as a tenant, which occupancy has existed for 13 years last past. The family of Olson consists of his wife and three children. The eldest child, Randy, is 19 years of age. He was graduated from Wayne High School in 1965 and is now a student at Wayne State College. A daughter, Rhonda, is 17 years of age and is a senior in Wayne High School. The third child, Rita, is 15 years of age and is a sophomore in Wayne High School. Olson has admittedly paid tuition for his children to the Wayne School District for more than 2 years.

The land in question is bounded on three sides by lands within the Wakefield School District. It is bounded on the south by lands in a rural school district. The land is five-eighths of a mile from the closest point in the Wayne School District. The two districts are adjoining, however, in other areas. A paved road runs between Wakefield approximately 5 miles to the east and Wayne approximately 6 miles to the west. There is some issue about the nearness of schoolbus lines but the evidence shows that either school district would pick up the children by bus on the paved road passing their residence if the children were attending its school. The Wayne School District and the Wakefield School District are both Class III schools, both are fully approved and ac-

credited according to the laws of the state, and both are accredited by the North Central Association of Colleges and Secondary Schools.

The issue in the present case involves the meaning to be given to section 79-403, R. S. Supp., 1963. This says that the petition shall state the reasons for the proposed transfer and show the following: (a) The land is owned by or in the possession of the petitioners; (b) that the land is located in a district that adjoins the district to which it is to be attached; (c) that the land to be transferred has children of school age residing thereon with their parents or guardians; and (d) that they reside more than 2 miles from the schoolhouse in their own district and at least one-half mile nearer to the schoolhouse or schoolbus route of the adjoining district to be measured by the shortest route upon section lines or traveled roads, or that the route is more practicable and for at least half its distance is over hard-surfaced roads; "Provided, that the distance to the schoolhouse in the adjoining district shall not exceed the distance to the schoolhouse in their own district by more than six miles or that they have personally paid tuition for one or more of their children to attend school in the other district over a period of two or more consecutive years, * * *." It is not questioned that the requirements of subdivisions (a), (b), and (c) are met. It is the meaning of subdivision (d) that is the issue here.

It is the contention of the Wayne School District that even though plaintiff's land is not one-half mile closer to its schoolhouse or bus route than that of the Wakefield district schoolhouse, the fact that plaintiff's lessee has paid tuition for 2 years or more to the Wayne district is superior to the distance provision. The Wakefield district asserts that the tuition provision is an alternative provision only where the distance to the adjoining district schoolhouse is more than 6 miles distant from the school district in which he geographically resides.

It is fundamental that the Legislature has plenary con-

trol over the boundaries of school districts, a purely legislative matter. It is the intent of the Legislature with which we are here concerned. In determining that intent, we consider the history of the legislation and the reasonableness of an interpretation when weighed against an unreasonable or absurd construction evidently not intended by the Legislature. It is the duty of the court to place such an interpretation upon the statute after an examination of the object to be accomplished, the evils and mischief sought to be remedied, and the purpose to be subserved. Rebman v. School Dist. No. 1, 178 Neb. 313, 133 N. W. 2d 384; Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119; Hevelone v. City of Beatrice, 120 Neb. 648, 234 N. W. 791; Safeway Cabs, Inc. v. Honer, 155 Neb. 418, 52 N. W. 2d 266.

The substance of section 79-403, R. S. Supp., 1963, had its origin in Laws 1909, chapter 117, section 1, page 451. Until the enactment of section 79-403, R. S. Supp., 1963, the payment of tuition played no part in the transfer of land from one school district to another under that section. Transfers during this period were primarily based on distance, roads, and road conditions. In 1963, the proviso with which we are here dealing first found its way into section 79-403, R. S. Supp., 1963. The construction to be placed on a proviso in a statutory enactment is of importance here.

The office and function of a proviso contained in a statute is to limit and qualify the preceding language of a statute and not to enlarge the effect of the statute. McDaniels v. McDaniels, 116 Ind. App. 322, 62 N. E. 2d 876. It is not the function of a proviso in a statute to enlarge the enacting clause. New Jersey State Board of Optometrists v. M. H. Harris, Inc., 14 N. J. Super. 66, 81 A. 2d 387. Generally, the operation of a proviso in a statute is confined to the clause or distinct portion of the enactment which immediately precedes it. State ex rel. Jones v. Second Judicial District Court, 59 Nev. 460, 96 P. 2d 1096, on rehearing, 59 Nev. 467, 98 P. 2d

342. The office of a proviso is to limit or restrain the preceding enactments, and cannot be held to enlarge such enactments. State v. Young, 74 Or. 399, 145 P. 647. The office of a proviso generally is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the Legislature to be brought within its purview. Perry v. Larson, 104 F. 2d 728. The office of a proviso is to restrict or explain the general terms of the act of which it forms a part, and not to add to the body of the substantive law nor to take anything therefrom. Brown v. Patterson, 224 Mo. 639, 124 S. W. 1; State Public Utilities Commission v. Early, 285 Ill. 469, 121 N. E. 63. The office of a proviso in a statute is generally either to except something from the enacting clause or to qualify or restrain its generality or to exclude some possible ground of misinterpretation of the statute, as extending to cases not intended by the Legislature to be brought within its purview, and not to confer a power or enlarge the enactment to which it is appended so as to operate as a substantive enactment itself. Bird & Jex Co. v. Funk, 96 Utah 450, 85 P. 2d 831.

The foregoing rules appear to be supported by the declared law of this state. In Lichtensteiger v. State, 89 Neb. 356, 131 N. W. 623, we quoted the following with approval: "'The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause.'" In City of Lincoln v. Nebraska Workmen's Compensation Court, 133 Neb. 225, 274 N. W. 576, the following is cited: "'A proviso which follows and restricts an enacting clause general in its scope, should be strictly construed, so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso, and the burden of proof is on one claiming the benefit of the proviso.'" See, also, Ford v. Boyd County, 111 Neb.

834, 197 N. W. 953; Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366; State ex rel. City of Grand Island v. Union Pacific R.R. Co., 152 Neb. 772, 42 N. W. 2d 867.

There being nothing to the contrary in the proviso contained in section 79-403, R. S. Supp., 1963, it must be construed as a limitation and qualification of the substantive part of subsection (1)(d) of the act immediately preceding the proviso therein and may not be construed as an enlargement of the substantive portion of subsection (1)(d).

In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. Rebman v. School Dist. No. 1, *supra*. It seems inconceivable to us that the Legislature intended that a landowner in a school district should be permitted to transfer his land to another adjoining school district for the sole reason that he had a tenant with children of school age living on the land who had paid tuition to the adjoining district for 2 years or more. Such a construction would permit any person living anywhere in the district, under similar circumstances, to transfer to an adjoining district if he has paid tuition to such district for 2 years. The attrition of the amount of taxable real estate in the district might well result, by such means, in a dismemberment of many school districts. It could well result in a substantial reduction of the children of school age in the district to its serious detriment. As we said in Rebman v. School Dist. No. 1, *supra:* "We cannot think the Legislature intended any such result."

We point out that prior to the enactment of section 79-403, R. S. Supp., 1963, transfers of land from one school district to another were permitted on the basis of distances and road conditions, conditions that remain as matters of primary concern in the substantive portion of

subsection (1)(d) of the statute. We find no evidence of intent in the proviso to enlarge the enacting clause or the substantive portion of the statute which immediately precedes it in subsection (1)(d).

In consideration of what we have heretofore said, the proviso is a limitation on the substantive provisions of subsection (1)(d). So considered, the proviso means that the substantive provisions of subsection (1)(d) must be met except that a transfer will not be permitted if the distance to school is increased by 6 miles unless the parties seeking transfer have personally paid tuition for one or more children in the adjoining district over a period of two or more years. Since the additional distance in attending school in the adjoining school district would not exceed 6 miles, the alternative provision in the proviso can serve no useful purpose in the instant case.

We think the proper interpretation of the proviso as such, as well as the interpretation given to subsection (1)(d) as a whole, in view of the resulting evils as weighed against any benefits accruing therefrom, requires the construction we have given to subsection (1)(d). The construction contended for by the plaintiff is not a reasonable one under all the circumstances. Its ill effects are so great under such construction that we cannot conceive of its coinciding with the legislative intent. In Rebman v. School Dist. No. 1, *supra,* a case arising under the same statute and involving a similar problem, we said: "Our adoption of the plaintiffs' construction would patently result in the dismemberment of many school districts at the will of freeholders and encourage unnatural and expensive competition between the adjoining districts with respect to buslines. We cannot think the Legislature intended any such result."

The reasons given by the plaintiff for the transfer are based largely on the personal convenience of plaintiff's tenant, Olson, and an alleged fear of recrimination against his children because of former disputes with the

Wakefield School District. Some contention is asserted that the Wayne school is to be preferred over the Wakefield school. But the size of a school or minor differences in extracurricular activities are not important considerations. The evidence shows that both schools are good schools of equal class, with equal accreditation, and with practically the same curricula, and that no valid complaint can be made of the educational efficiency of either school. We discussed this same problem as follows in Roy v. Bladen School Dist. No. R-31, *supra:* "In that regard, we conclude that the Legislature did not intend, in this modern highway and transportation age, to enact a statute concerned with schools, distances, and education of pupils for the sole purpose of making convenient allocations of land to school districts based upon individual preferences or secular business reasons of owners having nothing to do with educational efficiency. No witness criticized the leadership, management, curricula, or efficiency of the Bladen Schools. As a matter of fact, all witnesses approved it as entirely satisfactory."

We conclude that the proviso in subsection (1)(d) of section 79-403, R. S. Supp., 1963, is limiting and qualifying language intended to limit only the scope of subsection (1)(d), and not intended as a substantive part of the act granting a new and independent ground for transferring land from one school district to another. We conclude further that the foregoing interpretation of section 79-403, R. S. Supp., 1963, is the more reasonable and avoids the unreasonable and chaotic results inherent in the construction of the statute advocated by the plaintiff. The judgment of the district court is reversed and the cause remanded to the district court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER and BOSLAUGH, JJ., dissenting.

The problem in this case is not the office or function of a proviso, but rather what was the proviso included

in the 1963 amendment to section 79-403, R. S. Supp., 1963.

L.B. 691, as introduced in the 1963 session of the Legislature, amended section 79-403, R. S. Supp., 1961, so as to authorize a transfer where the route to the schoolhouse in the adjoining district was more practicable, one-half or more of the distance was over hard-surfaced roads, and the distance to the schoolhouse in the adjoining district was not more than 6 miles greater. The 6-mile limitation was in the form of a proviso. Language authorizing a transfer where tuition had been paid for 2 or more consecutive years was inserted following the proviso by a standing committee amendment.

The question is whether the payment of tuition was intended to be separate ground for transfer or to be a part of the proviso. We think that the more reasonable construction of the statute is that the proviso consists of the 6-mile limitation on increased distance to the new schoolhouse and refers to a transfer based upon a more practicable route.

Prior to our decision in State ex rel. Bottolfson v. School Board, 170 Neb. 417, 103 N. W. 2d 146, section 79-402, R. S. Supp., 1957, authorized a transfer between Class III districts where tuition had been paid for 2 or more years. It is reasonable to assume that the Legislature intended to restore this method of transfer which had been eliminated by the Bottolfson case. The 1965 amendment to section 79-403, R. S. Supp., 1963, which is described as a clarification of the statute is consistent with this construction.

GERTRUDE BECK, APPELLANT, V. IDEAL SUPER MARKETS OF NEBRASKA, INC., APPELLEE.

148 N. W. 2d 839

Filed February 24, 1967. No. 36390.

1. **Buildings: Negligence.** The owner of a building has a legal

duty to exercise ordinary care to keep the premises reasonably safe for the use of a business invitee. The defendant is not an insurer of the safety of invitees.

2. ———: ———. A change of level at the entrances or exits of buildings is to be expected and sidewalk and entrance elevations to most places, public and private, are quite without uniformity.
3. ———: ———. The mere fact that an invitee falls at the entrance of a building where a difference in level is present does not raise any presumption of negligence on the part of the owner and the doctrine of res ipsa loquitur does not apply.
4. **Negligence.** Negligence and a duty to use due care does not exist in the abstract but must be considered against a particular set of facts and circumstances. Under the facts here, the plaintiff failed to establish negligence on the part of the defendant.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Affirmed.

Robert V. Hoagland, for appellant.

John C. Coupland, Maupin, Dent, Kay & Satterfield, Clinton J. Gatz, Donald E. Girard, and John W. Sjostrom, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN. JJ., and KOKJER, District Judge.

MCCOWN, J.

This is an action for personal injuries sustained by the plaintiff in a fall at or near the doorway of defendant's store. The jury's verdict was for the defendant and the plaintiff has appealed.

On a beautiful Sunday afternoon, February 7, 1960, the plaintiff, who was not a regular customer, entered defendant's grocery store and purchased some groceries. As she left the store, she fell. The evidence is in direct conflict as to whether she fell in the doorway or outside the doorway. The plaintiff pleaded that the fall was caused solely by an obstruction in the exit doorway. She testified that she caught her shoe on a screw which protruded approximately ⅛ inch above the center of

a grooved metal doorsill plate. Her mother, who was with her, did not look at the doorway nor see any screw. The plaintiff and her son, who was 8 years old at the time of the accident, testified that they came to the store a week or two later and without going in, pulled the door open and saw the screw partly out. The trial was held more than 6 years after the accident.

Defendant's witnesses, including two employees who had assisted or observed the installation of the doors during the summer preceding the accident, testified there had never been a screw in the center of the doorsill. Their testimony was that the doorsill of the exit doorway was held on the north by a metal slot arrangement and one screw was placed in the hole near the south edge of the door. The holes for screws in the middle and to the north of the sill did not line up and no screws were ever installed there. The photographs confirm the testimony of defendant's witnesses.

The entrance and exit doors were side by side with a step-up from the sidewalk of about 2 inches extending across both doors. The plaintiff testified that she did not pay any attention to the doorsill going in and that as she left, she didn't look down at the doorstep or the doorsill. The plaintiff's pleadings and evidence as to defendant's negligence were grounded on and limited to the existence of a screw protruding ⅛ inch in the center of a grooved metal doorsill. There was no allegation of any other defect in construction or maintenance.

As a result of the fall, the plaintiff broke the outside metatarsal bone on her right foot and also claimed an aggravation of a former suppurative arthritis of the right hip.

There is no question but that the plaintiff was an invitee. The defendant had a legal duty to exercise ordinary care to keep the premises reasonably safe for the use of the invitee. The defendant, however, is not an insurer of the safe keeping of invitees. The liability of the defendant is for its own negligence. Jeffries v.

Safeway Stores, Inc., 176 Neb. 347, 125 N. W. 2d 914.

It is a matter of common knowledge that a change of level at the entrances or exits of buildings is to be expected and that sidewalk and entrance elevations to most places, private and public, are quite without uniformity. See Gorman v. World Publishing Co., 178 Neb. 838, 135 N. W. 2d 868.

In a case of this character, the burden is on the plaintiff to prove negligence on the part of the defendant. The mere fact that an invitee falls at the entrance of a building where a difference in level is present does not raise any presumption of negligence on the part of the owner and the doctrine of res ipsa loquitur does not apply. Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565.

Negligence and the duty to use due care does not exist in the abstract but must be measured against a particular set of facts and circumstances. See Gorman v. World Publishing Co., *supra.*

While it must be conceded that there are several glaring contradictions between the plaintiff's statements and depositions and her testimony at the time of the trial, she did testify that a screw protruded approximately ⅛ inch above the surrounding metal in the center of a grooved doorsill. However, her conclusion that she caught her shoe on the screw is not sufficient of itself to establish negligence on the part of the defendant. There is no testimony that such a condition in a grooved metal doorsill is unusual or defective. All of the facts disclosed by the evidence enter into a determination of what is reasonable in a particular case. Here the defendant had the duty to exercise ordinary care in the light of what it knew or reasonably should have known. The evidence does not sustain the plaintiff's burden of establishing that the condition here was unusual nor that it presented a trap for business patrons.

On these facts, the defendant's motion for directed verdict should have been sustained. In view of this

determination, the plaintiff's assignments of error relating to instructions become immaterial. It is therefore unnecessary to consider them.

For the reasons stated, the judgment is affirmed.

AFFIRMED.

SPENCER, J., concurring only in the result.

CARL WEBB ET AL., APPELLANTS, V. MARION LAMBLEY ET AL., APPELLEES.

148 N. W. 2d 835

Filed February 24, 1967. No. 36405.

1. **Equity: Appeal and Error.** While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other.
2. **Property: Fences.** Every one has the right to any beneficial use he may see fit to make of his own property, if the benefit he seeks is not out of all reasonable proportion to the injury caused to another.
3. **Evidence: Appeal and Error.** The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed upon this court on review of the findings made by the trial court to give consideration to the fact that the trial court did view the premises, providing the record contains competent evidence to support the findings.

Appeal from the district court for Brown County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Robert V. Hoagland, for appellants.

Samuel C. Ely and J. Marvin Weems, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH,

SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

SPENCER, J.

This is an equitable action brought by Carl Webb and Evelyn Webb, plaintiffs and appellants, against Marion Lambley and Bonnie Lambley, to enjoin the maintenance of certain alleged nuisances and for damages. Defendant Marion Lambley cross-petitioned for relief from an alleged spite fence. The action was dismissed as to Bonnie Lambley. Plaintiffs were substantially granted the requested injunction against the defendant Marion Lambley, but were denied any recovery of damages. Marion Lambley, who will hereinafter be referred to as defendant, was awarded injunctive relief on his cross-petition against the alleged spite fence. Plaintiffs have perfected an appeal to this court. They set out six assignments of error which involve only two points, the nature of plaintiffs' fence and whether plaintiffs are entitled to the recovery of damages.

Defendant is the owner of an 8⅔-acre tract 650 feet north of the north city limits and 317 feet west of the west city limits of Ainsworth, Nebraska. Plaintiffs are the owners of a 5-acre tract adjoining the defendant's tract on the east. Defendant purchased his property from his mother in 1963. At that time, plaintiffs were renting the property and defendant paid the plaintiffs for a release of the lease. The record reflects that plaintiffs were unhappy about the sale because they believed they had an agreement for first chance at the property if it were offered for sale.

In the summer of 1963, defendant set a house on high ground in the northeast corner of his premises, facing east toward the property of the plaintiffs which slopes from the hill on which defendant's house was located. Defendant's front porch is approximately 50 feet west of the division line between the properties. In October 1963, plaintiffs began the construction of what they described as a windbreak 10 feet east of their west prop-

erty line facing defendant's front porch. The structure starts approximately 30 feet from the north line of plaintiffs' property. It is directly east of the defendant's house, starting on a line with the north end of the defendant's front porch, and then extends approximately 60 feet to the south. The structure is composed of rough boards and slabs, or, as plaintiff Carl Webb described it, "stray lumber," all of different lengths varying from 8 feet to 12 feet.

Plaintiffs' testimony would indicate the fence is intended as a windbreak which serves a useful purpose in protecting their sheep. Defendant's testimony would indicate the fence is of little benefit, if any, as a windbreak because of its nature and its location, and serves no useful purpose. The undisputed evidence is that the structure does shut off defendant's view to the east and does depreciate the defendant's property at least $3,000. The evidence is in irreconcilable conflict. The trial court inspected the premises and specifically found that the structure serves no beneficial purpose, is unsightly, is maintained for the purpose of annoying the defendant, and should be abated as it now exists.

While the law requires this court, in determining an appeal in an equity action involving questions of fact to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. Onstott v. Olsen, 180 Neb. 393, 142 N. W. 2d 919.

"Every one has the right to any beneficial use he may see fit to make of his own property, if the benefit he seeks is not out of all reasonable proportion to the injury caused to another." Bush v. Mockett, 95 Neb. 552, 145 N. W. 1001, 52 L. R. A. N. S. 736. Quoting from that opinion: " 'No one ought to have the legal right to

make a malicious use of his property for no benefit to himself, but merely to injure his fellow man. To hold otherwise makes the law an engine of oppression with which to destroy the peace and comfort of a neighbor, as well as to damage his property for no useful purpose, but solely to gratify a wicked and debasing passion.' "

The trial court inspected the premises herein. He observed the topography of the land, the nature of the structures, and other pertinent facts. The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed upon this court on review of the findings made by the trial court to give consideration to the fact that the trial court did view the premises, providing the record contains competent evidence to support the findings. Wiese v. Klassen, 177 Neb. 496, 129 N. W. 2d 527.

Plaintiffs complain that the order of the trial court is indefinite because it abates the structure "as it now exists." The record indicates that except for this structure the plaintiffs' premises are neat and in keeping with the surrounding area. The trial court did not find that the plaintiffs should be enjoined from maintaining any fence or windbreak, but required them to abate the present one. From the location of the structure, the nature of the materials used, and the manner of its construction, we agree with the trial court its utility as a windbreak is at best only incidental to its placement.

Plaintiffs allege that the defendant permitted sewage from his septic tank to drain for 50 feet down a slope across plaintiffs' property into a stream running through their property. This drainage, which was basically water, froze during the winter months, creating an ice slide from 4 to 12 feet wide which was hazardous for registered horses plaintiffs were raising on the premises. Plaintiffs also allege that the defendant maintained three dog houses on his premises, 10 to 15 feet west of the pasture division fence, directly above where the seep-

age entered plaintiffs' property; and that these dogs were permitted to run at large, came onto plaintiffs' premises, and chased their horses. Plaintiffs further allege that the dogs and the refuse defendant permitted to blow across plaintiffs' property spooked their horses so that some of them slipped on the ice and were injured. Plaintiffs claim the ice slide, the dogs, and the refuse forced them to pasture their horses elsewhere and to convert to a sheep operation.

The testimony does not sustain the allegation that the defendant permitted his dogs to run loose. The undisputed evidence is that the dogs were chained to their houses at all times. The evidence indicates that while plaintiffs never saw the defendant's dogs chasing their horses, they did see them run out of their houses barking and scaring the horses. The defendant's evidence indicates that his dogs did not bark at plaintiffs' horses, and defendant testified they had been trained not to bark at livestock.

On the issue of damages, plaintiff Carl Webb testified to specific injuries to three of his animals. During the winter of 1963, a yearling mare was spooked by the dogs or flying paper, slipped on the ice, and sprained an ankle. He still owns this animal and is using it for the purpose originally intended, as a brood mare. One of his colts threw a stifle, and a gray mare with foal slipped on the ice and aborted the next day. He admitted that he did not know if the colt with the stifle slipped on the ice, and that he did not see the gray mare slip but saw a mark on the ice where he thought she had slipped. The testimony is undisputed that there are many causes for abortions and that horses will not cross ice unless they are spooked. Carl Webb also testified he did not know where the paper he saw blowing on his place originated.

Plaintiffs also claimed damages on the grounds that the nuisances which the court found to exist had forced them to abandon the use of the property for their regis-

tered horses and to convert to a sheep operation. They testified to an additional outlay of $845 to make the conversion.

The trial court found that defendant had changed the course of the drainage from his septic tank and had abated the nuisance prior to the trial, but because there could be a possibility of a recurrence defendant was permanently enjoined from permitting sewage to drain upon plaintiffs' property. The court further found that defendant before the trial had moved his dogs to another part of his property and any nuisance which existed had been thereby abated, but did permanently enjoin defendant from housing his dogs adjacent to the pasture fence or in any area close enough to the fence where they could harass plaintiffs' livestock.

The court specifically found that plaintiffs had failed to establish causation; that an inspection of the premises revealed that many hazards existed on the premises which could cause injury to livestock; that any proof on damages was indefinite or more or less speculative; and that plaintiffs were not entitled to damages. We cannot say that this finding is erroneous on the record herein.

For the reasons given, the judgment herein is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES F. GILMAN, APPELLANT.

148 N. W. 2d 847

Filed February 24, 1967. No. 36406.

1. **Criminal Law.** An accused who pleads the general issue without questioning a defective verification of the charge waives the defect.
2. ———. The action of the district court in imposing sentence and denying probation in a criminal prosecution will not be

disturbed on appeal unless the record shows an abuse of discretion.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

No appearance for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

SMITH, J.

Defendant was charged with operating a motor vehicle after suspension of his operator's license without reinstatement, second offense. An appeal having been taken to the district court, a jury found him guilty. The court determined that the violation was a second offense, and it imposed sentence. Defendant contends on appeal that the court erred in overruling a motion in arrest of judgment and in denying probation.

The complaint was unverified, but defendant first raised the question by the motion after verdict. A defective verification is subject to a motion to quash or a plea in abatement. A defendant who pleads the general issue without raising the question, however, waives the defect. See, §§ 29-610, 29-1808, 29-1812, 29-2104, and 29-2105, R. R. S. 1943; State v. Ninneman, 179 Neb. 729, 140 N. W. 2d 5; Morrow v. State, 140 Neb. 592, 300 N. W. 843; Davis v. State, 31 Neb. 247, 47 N. W. 854. Overruling defendant's motion was correct.

The action of the district court in imposing sentence and denying probation will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Steinhausen, 180 Neb. 778, 145 N. W. 2d 584. The sentence in the present case was clearly within judicial discretion.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVE MARTINEZ, APPELLANT.

148 N. W. 2d 841

Filed February 24, 1967. No. 36421.

1. **Criminal Law.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Continuances.** A motion for continuance is addressed to the sound discretion of the trial court and, in the absence of an abuse of discretion, the denial of a continuance is not error.
3. **Trial: Evidence.** The scope of the cross-examination of a witness rests largely in the discretion of the trial court.

Appeal from the district court for Morrill County: JOHN H. KUNS, Judge. Affirmed.

J. Cedric Conover, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

BOSLAUGH, J.

The defendant, Steve Martinez, was convicted of burglary. His motion for new trial was overruled and he has appealed.

The evidence shows that the Gamble Store in Bridgeport, Nebraska, was burglarized on February 16, 1966. The defendant's automobile was seen parked near the store at the time of the burglary, and an accomplice, Larry Rupp, testified in detail as to the defendant's participation in the crime. The defendant denied that he participated in the burglary and testified that he was in Scottsbluff, Nebraska, at the time. Several other witnesses corroborated his testimony.

The effect of the defendant's evidence was to present a question for the jury. It is not the province of this court to resolve conflicts in the evidence, pass on the

credibility of witnesses, or weigh the evidence. State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428. The evidence of the State, if believed, was sufficient to sustain the conviction. See Rains v. State, 173 Neb. 586, 114 N. W. 2d 399.

The defendant was arrested in Scottsbluff, Nebraska, on the day following the burglary but was not brought before a magistrate in Morrill County until May 4, 1966. The defendant claims that this was a violation of his constitutional right to a speedy trial. The record indicates that the delay was caused by the fact that the defendant was being held in Scotts Bluff County in connection with a break-in at Morrill, Nebraska. The record does not show a violation of the defendant's right to a speedy trial.

Before the trial commenced, the State was granted leave to endorse the name of Gene Gasseling upon the information as a witness for the State. The motion recited that the name of the witness was unknown at the time the information was filed and that the witness had not been found until late in the afternoon of the preceding day. The defendant moved for a continuance which was denied. The trial court stated that the motion was overruled on the condition that the defendant's counsel be given an opportunity to interview the witness before he was called to the witness stand.

Gasseling, who was a trusty at the county jail in Gering, Nebraska, at that time, testified to conversations which he had overheard between defendant, Rupp, and a third participant, Dave Rico. Apparently, there had been a tentative arrangement for Rupp to assume the entire guilt, but Rupp later implicated the defendant in the burglary. Gasseling's testimony tended to corroborate Rupp and was cumulative in nature.

A motion for continuance is addressed to the sound discretion of the trial court and, in the absence of an abuse of discretion, the denial of a continuance is not error. State v. Kent, 174 Neb. 115, 116 N. W. 2d 31.

Under the circumstances in this case, the denial of the defendant's motion for a continuance was not error.

The defendant also complains that his counsel was not allowed to talk with Rupp or Rico until just before they were called to testify. Counsel for the defendant had been appointed prior to the preliminary hearing in county court on May 12, 1966. The trial in the district court did not commence until June 22, 1966. The record does not show what efforts were made to interview Rupp or Rico before trial; that the defendant's counsel was denied access to either witness; or that the matter was presented to the trial court at any time before trial. Under the facts and circumstances of this case, the assignment of error is without merit.

The defendant further contends that the cross-examination of Rupp was unduly restricted by the trial court. Rupp was questioned about an interview with a state patrolman in which Rupp had stated that he wanted to testify that the defendant had not participated in the burglary. Then the following occurred: "Q Then, as a result of that, yesterday, I guess you were charged with—

"THE COURT: Mr. Conover, the pendency of charges is irrelevant."

Earlier, the defendant had been permitted to show that Rupp had been advised by the county attorney to tell the truth and that he would be charged with perjury if he testified falsely. The following had occurred: "Q Did he tell you that if you varied from that statement, he would prosecute you for perjury? A No, not to me, he didn't say nothing. Q But he did that the other day? A Yes."

The scope of the cross-examination of a witness rests largely in the discretion of the trial court. State v. Brown, 174 Neb. 387, 118 N. W. 2d 328. In this case the defendant had cross-examined Rupp in detail as to his prior inconsistent statements and had been allowed to show that Rupp had been charged with perjury. Under

these circumstances, the ruling of the trial court was not an abuse of discretion.

The judgment is affirmed.

AFFIRMED.

CHARLES A. SULLIVAN, APPELLEE, V. DAVID CITY BANK, A CORPORATION. APPELLANT.

148 N. W. 2d 844

Filed February 24, 1967. No. 36440.

1. **Master and Servant: Damages.** The proper remedy for the wrongful discharge of an employee is an action for damages for the breach of the contract of employment.
2. **Contracts: Damages.** An action for damages for the breach of a contract of employment may be brought immediately after the contract has been breached, and the employee may recover his full damages even though the term of the contract of employment has not yet expired.
3. ———: ———. The measure of damages in a suit for breach of contract for personal services is the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period.
4. **Master and Servant: Damages.** The burden is upon the employer to prove that the employee obtained other employment or, with reasonable diligence, might have obtained other employment.
5. ———: ———. In the absence of proof that the employee obtained other employment or, with reasonable diligence, might have obtained other employment, the measure of damages is the contract price.

Appeal from the district court for Butler County: H. EMERSON KOKJER, Judge. Affirmed.

Ray E. Sabata and Joseph C. Hranac, for appellant.

Russell A. Souchek, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

BOSLAUGH, J.

This is an action for damages for breach of an employment contract. The plaintiff, Charles A. Sullivan, was discharged from his employment as cashier of the defendant, David City Bank, on September 30, 1964. This action was brought to recover the damage resulting from the loss of 3 months' salary.

A jury was waived and the action was tried to the court which found generally for the plaintiff. The defendant's motion for new trial was overruled and it has appealed.

The defendant's principal contentions are that the plaintiff did not have a contract of employment for 1 year and that the defendant's discharge of the plaintiff was not wrongful.

The record shows that at a meeting of the defendant's directors held on January 23, 1964, the plaintiff was elected cashier of the defendant and his salary fixed at $7,200 "for the following year." The articles of incorporation of the bank provide that the terms of its officers "shall be for one year or until their successors are elected and qualified," which conforms with the requirements of section 8-124, R. S. Supp., 1965. This evidence is sufficient to support a finding that the plaintiff had been employed by the defendant for 1 year. See, Sotter v. Coatesville Boiler Works, 257 Pa. 411, 101 A. 744; Houghtaling v. Upper Kittanning Brick Co., 155 N. Y. S. 540, 92 Misc. 228.

The National Bank Act specifically provides that a national banking association shall have the power to dismiss its officers "at pleasure." 12 U. S. C. A., § 24, p. 19. There is no similar provision in our statutes and no corresponding power in a state bank to dismiss its officers at its pleasure.

The defendant attempted to establish cause for the dismissal of the plaintiff. The president of the bank testified to a number of incidents which are urged as a justification for the dismissal. The incidents included,

among others, leaving the bank early, failure to cooperate with other employees, inability to operate a posting machine, errors in posting ledger balances, and frequenting the American Legion Club. There was other evidence concerning misconduct at a football game. These incidents were largely minor in nature. Some of them had never been mentioned to the plaintiff and appeared to be afterthoughts on the part of the bank president. Considered as a whole, this evidence was not of such a nature as to require the trial court to find that the dismissal was for cause. At best this evidence presented a question of fact for the trial court.

The defendant claims that the action was premature. It was commenced on October 13, 1964, before the term of the employment had expired.

The plaintiff cannot recover "wages" for services constructively performed. Lee v. Ralston School Dist., 180 Neb. 784, 145 N. W. 2d 919. He can recover only damages for the breach of the contract of employment. Such an action may be brought immediately after the contract has been breached. See, Howard v. Chicago, B. & Q. R.R. Co., 146 F. 2d 316; 35 Am. Jur., Master and Servant, § 56, p. 488.

There is some disagreement among the authorities as to the extent of the recovery where the action is brought and tried before the expiration of the term of the employment. The judgment in this case was for the full 3 months' salary with interest. The trial did not commence until December 15, 1965, nearly 1 year after the expiration of the term of the employment. We believe that the better rule is that the employee may recover his full damages even where the action is tried before the expiration of the term of the employment. See Annotation, 91 A. L. R. 2d 682.

The defendant contends that the judgment is excessive because the plaintiff could have obtained other comparable employment. The measure of damages in a suit for breach of contract for personal services is the amount

of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period. Lee v. Ralston School Dist., *supra*. The burden is upon the defendant to show that the plaintiff obtained other employment or, by diligence, might have obtained other employment. Schlueter v. School Dist. No. 42, 168 Neb. 443, 96 N. W. 2d 203.

The evidence is undisputed that the plaintiff did not obtain other employment, and there was a failure of proof to show that the plaintiff, by the exercise of due diligence, might have obtained other employment. In such circumstances, the measure of damages is the contract price. Schlueter v. School Dist. No. 42, *supra*.

The trial court did not err in allowing the plaintiff to recover his full damages resulting from the breach of the contract of employment.

The judgment of the district court is affirmed.

AFFIRMED.

WILLIS R. ANDREWS, APPELLEE, V. W. IRVING WILKIE, APPELLANT.

148 N. W. 2d 924

Filed March 3, 1967. No. 36273.

1. **Appeal and Error.** On appeal to the Supreme Court, the cause will be treated and disposed of upon the theories presented by the parties upon the trial if a liberal construction of the pleadings, as construed by them, will permit the same to be done.
2. **Contracts: Evidence.** The terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof.
3. **Contracts.** The express agreement of the parties in terms or effect may be to pay what the services rendered are reasonably worth, and such an agreement will be implied where there is no agreement as to the amount of compensation.
4. **Trial: Appeal and Error.** The verdict of a jury will not be disturbed unless it is clearly wrong.

5. **Attorney and Client.** As a basis for the allowance of an attorney's fee under the provisions of section 25-1801, R. R. S. 1943, the record must show pleading and proof of the existence of the conditions precedent set out in that statute.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed as modified.

G. Merrill Kartman and Robert H. Beach, for appellant.

William H. Mecham, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

KOKJER, District Judge.

The defendant W. Irving Wilkie leased 320 acres of land in Iowa to the plaintiff Willis R. Andrews, by written lease, for a term of 1 year beginning March 1, 1958. Plaintiff held over the initial 1-year term under the original lease until February 28, 1963. The lease contained provisions regulating the time when plowing should or should not be done. In August of the year 1962 plaintiff plowed some of this land. He testified he plowed 125 acres. The parties evidently tried the case on the theory that this plowing was not permitted under the written lease; but plaintiff claimed there was an oral agreement which modified the terms thereof. Defendant denied there was any such oral agreement. The only issue tried and submitted to the jury was whether or not the parties had a valid, binding contract by virtue of which they had varied, altered, or amended their written lease of the land regarding the plowing, and, if so, the amount of the recovery.

Plaintiff testified that late in July or early in August of 1962 the parties met to complete some papers needed in connection with collecting the final soil bank payment. He testified that at that meeting the following conversation took place: "I told Mr. Wilkie we was spending a lot of money for fertilizer and there was a lot of dead

stuff there from the weed killer after I had sprayed that laid there on the ground, and that if we would go ahead and plow that this fall, it would help us out quite a bit for fertilizer for another year, and I thought it would add quite a little bit to the ground. You always get a little more per acre when anything is fall-plowed. I asked him, 'What do you think about doing that?' He says, 'I think that would be a good idea; you go ahead and plow it.'" Mr. Wilkie denied that he made any separate agreement as to plowing the land in the summer of 1962.

Mr. Wilkie sold the land and gave plaintiff notice to vacate on the following February 28th, which plaintiff did.

Defendant argues that the contract could not be varied orally and that there was no consideration for an oral agreement to alter or modify the prior written contract. The detriment to plaintiff or the benefit to defendant would be consideration. In the case of Todd Brothers v. Federal Crop Ins. Corp., 178 Neb. 211, 132 N. W. 2d 778, this court said: "A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration." It has also been held that the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Swanson v. Madsen, 145 Neb. 815, 18 N. W. 2d 217; Carpenter Paper Co. v. Kearney Hub Publishing Co., 163 Neb. 145, 78 N. W. 2d 80.

There could have been an express agreement of the parties in terms or effect to pay what the services were reasonably worth and such an agreement will be implied where there is no agreement as to the amount of compensation. 17A C. J. S., Contracts, § 363, p. 367. There was testimony here as to the reasonable value of the plowing.

An appeal to the Supreme Court will be treated and disposed of upon the theories presented by the parties

upon the trial if a liberal construction of the pleadings, as construed by them, will permit the same to be done. Crancer Co. v. Combs, 94 Neb. 655, 144 N. W. 251, reversed on rehearing on other grounds; Woolworth v. Parker, 57 Neb. 417, 77 N. W. 1090.

The case was submited to a jury upon the theory adopted by the parties, and the jury found for the plaintiff. The evidence adduced was sufficient to sustain such a verdict. The verdict of a jury will not be disturbed unless it is clearly wrong. Eden v. Klaas, 166 Neb. 354, 89 N. W. 2d 74.

Defendant questioned the allowance of an attorney's fee which was taxed against him in the district court, and asks that no fee be taxed in this court. As a basis for the allowance of an attorney's fee under the provisions of section 25-1801, R. R. S. 1943, the record must show pleading and proof of the existence of the condition precedent set out in the statute. Haley v. Fleming, 148 Neb. 407, 27 N. W. 2d 626. There is no pleading nor proof shown by the record here to meet this requirement.

The judgment should be modified to disallow the attorney's fee taxed in the district court, and none should be allowed here. The judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ROGER C. LEVELL, APPELLANT.

149 N. W. 2d 46

Filed March 3, 1967. No. 36360.

1. **Statutes.** Ordinarily, if words used in a legislative act had, at the time used, received a settled construction, it is presumed that the Legislature adopted them in that sense.
2. ———. In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act and give effect thereto.

3. ———. In determining the meaning of a legislative act, resort may be had to the title.
4. ———. While a penal statute must be expressed in clear language, it is not necessary that it be so written as to be beyond the mere possibility of more than one construction.
5. ———. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it.
6. ———. When language of a statute is unambiguous, there is no necessity for construction; courts have no jurisdiction to change the language of the statute.
7. **Indictments and Informations.** An information charging an offense in substantially the words of the statute is generally sufficient.
8. **Constitutional Law.** The purpose of the constitutional provision requiring that no bill shall contain more than one subject and that the same shall be clearly expressed in the title is to prevent surreptitious legislation and to provide that notice of the subject matter of the proposed law, through the title to the bill, is given to members of the Legislature and the public.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

William L. Walker, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and POLLOCK, District Judge.

WHITE, C. J.

Some knives, missing from the vegetable preparation department of the kitchen at the Nebraska Penal and Correctional Complex, were found in a brine tank. An investigation by prison officials ensued. The defendant and several other inmates were interrogated by prison officials on Friday and Saturday, December 17 and 18, 1965. On Saturday, December 18, 1965, the defendant and inmates Sharp and Mason were ordered to be taken to the adjustment center pending completion of the investigation concerning the missing knives. The defendant denied having taken the knives or having knowledge of

who did. On the way to the adjustment center, the three inmates were walking abreast ahead of three officers. Lieutenant Foster testified that he was immediately behind the defendant as the group proceeded down the sidewalk south of the administration building. When they reached a point on the sidewalk close to the commissary building, the State's testimony is to the effect that the defendant suddenly turned around and swung and hit Foster in the forehead. Foster was knocked down by the blow and his face bloodied. The defendant and several inmates testified that Foster struck Levell first. The State's testimony, including that of the officers, directly contradicted this.

Defendant was charged and convicted by a jury of a violation of subsection (2), section 28-411, R. S. Supp., 1965. He was sentenced to a period of 3 years in the Nebraska Penal and Correctional Complex, from which he appeals.

Defendant's basic contention, summarizing his assignments of error, is that the assault of a guard by an inmate does not fall under subsection (2), section 28-411, R. S. Supp., 1965. Section 28-411, R. R. S. 1943, was amended by the 1965 Legislature by Laws 1965, c. 137, § 1, p. 476, referred to herein as L.B. 698, and it reads in full as amended as follows: "(1) Except as provided in subsection (2) of this section, whoever unlawfully assaults or threatens *another* in a menacing manner, or unlawfully strikes or wounds *another* shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars or be imprisoned in the jail of the county not exceeding six months, and shall, moreover, be liable to the suit of the party injured. (2) Whoever, being confined or in legal custody in the Nebraska Penal and Correctional Complex or any road camp thereof, whether as trusty or otherwise, or in the State Reformatory for Women, unlawfully assaults or threatens *another* in a menacing manner, or unlawfully strikes or wounds another, shall be guilty of a felony and shall, upon con-

viction thereof, be imprisoned in the Nebraska Penal and Correctional Complex or the State Reformatory for Women for not more than five years." (Emphasis supplied.)

The substance of defendant's contention is that the word "another" in subsection (2), means "another inmate" and not "another person." We do not agree. L.B. 698 (now section 28-411, R. S. Supp., 1965), added subsection (2) to what was the basic law of assault and battery as contained in the prior section, section 28-411, R. R. S. 1943. Both parties concede, and there can be no doubt, that the word "another" in subsection (1) of this statute means "another person." We feel that it is clear that subsection (2) simply provides that whoever is an inmate in the Nebraska Penal and Correctional Complex and commits the same offense, shall be guilty of a felony. The language defining the essential nature of the crime "unlawfully assaults or threatens another" is identical in subsections (1) and (2) of the statute. Subsection (2) simply provides that when a particular class of persons, namely inmates, committed the same offense, that it constituted a felony. The word "another" as used in subsection (1) of the statute has long meant "another person." That being true, when the Legislature used the same word in subsection (2), it is presumed to have adopted the same meaning. Here applicable is the principle announced in Brasier v. City of Lincoln, 159 Neb. 12, 65 N. W. 2d 213, in which the court stated: "It has long been the rule that if the words used in a legislative act had, at the time used, received a settled construction, we must presume that the Legislature adopted them in that sense." It is also clear that a different meaning has not been expressed in the context of this statute. We hold that it has the same significance and meaning as employed in subsection (1) of the statute.

This interpretation is reinforced when we read the title of L.B. 698 which is as follows: "An Act to amend

section 28-411, Reissue Revised Statutes of Nebraska, 1943, relating to crimes and punishments; *to provide when violation thereof shall be a felony;* to provide a penalty; and to repeal the original section." (Emphasis supplied.) It therefore appears that the stated purpose of the amendment was to provide under what circumstances a violation of subsection (1) would constitute a felony. Construing the language employed in the title to the act and the amendment, we can come to no other conclusion than that the word "another" used in subsection (2) meant "another person" and not "another inmate."

Defendant further argues that since the statute is susceptible to two different interpretations, it must fall under the rule of strict construction of a penal statute. We do not agree. While a penal statute must be expressed in clear language, it is not necessary that it be so written as to be beyond the mere possibility of more than one construction. 22 C. J. S., Criminal Law, § 24, (2)a, p. 72. The possible interpretation that defendant would have us accept would be out of harmony with the title to the act, its evident purpose and intent, and would further lead to an unreasonable and absurd conclusion. It would require us to hold that assaults by inmates on each other would be a felony whereas an assault by an inmate on a guard or other persons not inmates would be a misdemeanor. We do not believe that the Legislature in passing this statute intended to place a higher value on the safety of inmates than it places on the safety of guards or other persons who necessarily come into contact with inmates. Even assuming that there are two possible constructions of the statute, which is not true, a construction which is unreasonable or creates absurdities should not be adopted. The legislative intent is clearly discoverable from the language of the act and the title. It was simply to provide that when an assault was committed by an inmate against any other person the Legislature declared it to be a felony

and provided an appropriate penalty. The following principles are applicable. In In re Guardianship of Kraft, 150 Neb. 171, 33 N. W. 2d 534, the court stated: " 'In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act and give effect thereto.' " In Pierson v. Faulkner, 134 Neb. 865, 279 N. W. 813, it was said: "When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness or unequal operation and the other of which avoids such a result, the latter should be adopted."

Defendant cites the committee's statements before the Legislature and the floor debate in connection with the passage of L.B. 698. Defendant also cites several rules of statutory construction. The legislative history and the general rules of statutory construction may be resorted to in case of ambiguity or uncertainty. As we have seen however the statute here is clear and unambiguous and, as we view it, susceptible to only one interpretation; that is, that the word "another" means "another person." The following is applicable from State ex rel. Finigan v. Norfolk Live Stock Sales Co., Inc., 178 Neb. 87, 132 N. W. 2d 302, on rehearing, wherein this court stated: "Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it. * * * When language of a statute is unambiguous, there is no necessity for construction; courts have no jurisdiction to change the language of a statute."

We have examined the contentions of the defendant as to the construction of subsection (2) of L.B. 698 (section 28-411, R. S. Supp., 1965) and find them to be without merit.

Defendant claims that subsection (2) of L.B. 698 (section 28-411, R. S. Supp., 1965) is unconstitutional because it is vague and ambiguous. Again, this argument rests upon the proposition that the word "another" means "another inmate." As we have seen, this proposition is without merit and therefore the argument of the de-

fendant as to the unconstitutionality of L.B. 698 falls.

Defendant contends that L.B. 698 is unconstitutional and void as being a violation of Article 3, section 14, of the Constitution of the State of Nebraska, which provides in part that: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." He contends that the title to the act was not broad enough to justify the enactment of subsection (2). The title to the act, which has been quoted hereinbefore, provides that it is an act to amend section 28-411, R. R. S. 1943, and "to provide when violation thereof shall be a felony, * * *." The purpose of the constitutional provision is to prevent surreptitious legislation and to provide that notice of the subject matter of the projected law, through the title to the bill, is given to members of the Legislature and the public. Here the subject of the bill was to amend the previous assault and battery statute. It states that its purpose was to provide when a violation thereof should become a felony. The Legislature and the members of the public were advised by this title that it was intended to amend the law of assault and battery as it previously existed and to provide when it should become a felony. The act, as we have previously pointed out, clearly and explicitly does this very thing. The title of the act was germane to the section amended and clearly advised anybody interested as to its purpose and to the general nature of its contents. The act itself was clearly confined to the same subject matter as in the section sought to be amended. In County of Dawson v. South Side Irr. Co., 146 Neb. 512, 20 N. W. 2d 387, this court stated as follows: "In State v. Tibbets, 52 Neb. 228, 71 N. W. 990, the following is quoted with approval from Miller v. Hurford, supra: 'That an amended section must be germane to the section amended does not mean that it must be confined to the same limits; that it cannot be enlarged and extended beyond the limits of the original section. It only means that it must be con-

fined to the same subject-matter, or have the same object in view, and this subject-matter or object may be general in its nature. So long as the legislature fairly confines itself to the object of the original section it is sufficient.' "

In State ex rel. City of Columbus v. Price, 127 Neb. 132, 254 N. W. 889, it is said: "If by a fair and reasonable construction the title calls attention to the subject-matter of the bill, it may be said that the object is expressed in the title." Other authorities are abundant to the effect that it is not necessary for the title to analyze the bill in detail and it is not necessary that the title inform the readers of the specific contents of the bill. This was an amendatory act. The title clearly expressed the purpose of enacting subsection (2), and subsection (2) was clearly germane to the subject matter expressed in the title of the act. The Legislature clearly confined itself to the object of the amendment as expressed in the title. There is no merit to this contention.

Defendant contends that the information in this case did not inform the appellant with reasonable certainty of the charge against him. The information in this case charges the commission of the offense substantially in the words of the statute. It charged that the defendant, "while being confined and in legal custody of the Nebraska Penal and Correctional Complex, did unlawfully assault and strike William Foster * * *." An information charging an offense in substantially the words of the statute is generally sufficient. Hans v. State, 147 Neb. 67, 22 N. W. 2d 385; McKenzie v. State, 113 Neb. 576, 204 N. W. 60; Chadek v. State, 138 Neb. 626, 294 N. W. 384.

Citing Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, defendant contends that his constitutional rights were violated when he was interrogated by prison officials as to the missing

knives. Those cases relate to the use of a confession obtained without proper warning of constitutional rights and of the right to counsel. There was no confession used in this case and the evidence is undisputed that the defendant made no admission with respect to the taking of the knives or placing them in the brine tank. Further, the interrogation by the prison officials was with relation to the maintenance of internal security and to the rules and regulations of the prison, and did not relate to nor did it concern a prosecution for any crime. Defendant's constitutional rights were not violated and there is no merit to this contention. The interrogation by the prison officials in this case, with respect to the knives in the brine tank, was a matter of purely internal discipline in the prison and not subject to judicial review. See, Kostal v. Tinsley, 337 F. 2d 845; Roberts v. Pegelow, 313 F. 2d 548. There is no merit to this contention.

Finally, the defendant complains of the giving of a number of instructions in this case. The contention as to these instructions is based upon the argument that the trial court erroneously instructed on the theory that the word "another" in the statute meant "another person" and not "another inmate." As we have seen, this contention has no merit and consequently the argument as to the erroneousness of the instructions in this respect falls.

The contentions of the defendant are without merit. The judgment of the district court is correct and is affirmed.

AFFIRMED.

HARRY OBITZ, APPELLANT, V. AIRPORT AUTHORITY OF THE CITY OF RED CLOUD, NEBRASKA, A PUBLIC CORPORATION, ET AL., APPELLEES.

149 N. W. 2d 105

Filed March 3, 1967. No. 36389.

1. **Municipal Corporations.** The powers granted to a municipal corporation can be divided into two general classes: the one including those which are legislative, public, and governmental, and import sovereignty, and the other including those which are corporate, proprietary, and quasi-private, conferred for the private advantage of the municipality.
2. **Municipal Corporations: Taxation.** The general governmental powers of a municipality are subject to the complete control of the state and no discretionary power is lodged in the municipality in regard to such powers as to whether or not they will be complied with. In levying taxes for such purposes of general concern, the legislative act is compulsory and the consent of the municipality or its inhabitants is immaterial.
3. **Municipal Corporations: Aviation.** The corporate, proprietary, and quasi-private powers of a municipality are matters of purely local concern and, except in conferring power and regulating its exercise, the state has no compulsory power to impose them or to impose taxes for their support on the municipality. The Legislature may, however, authorize the local authority to impose such taxes upon itself.
4. ———: ———. The construction, operation, and maintenance of an airport by a municipality or an airport authority is a proprietary function.
5. **Constitutional Law: Aviation.** The provisions of section 3-504, subsection (12), R. R. S. 1943, providing that an airport authority shall have power to certify to the city the amount of tax not exceeding one mill to be levied by the city on its tangible property for airport purposes, is a levy by local authority for local purposes and does not violate Article VIII, section 7, of the Constitution of Nebraska.
6. **Municipal Corporations: Aviation.** The one mill tax authorized by section 3-504, subsection (12), R. R. S. 1943, is included in the terms "any part of the revenue, income, receipts, profits, and other money derived by the authority" contained in section 3-507, R. S. Supp., 1965, and may be pledged for the payment of general obligation bonds of the authority by the terms of the latter act.
7. ———: ———. The pledge of the taxes authorized by section

3-504, subsection (12), R. R. S. 1943, does not violate section 3-509, R. R. S. 1943, providing that the bonds of the authority shall not be a debt of the city.

8. ———: ———. The pledge of money to be derived in the future from levies made pursuant to section 3-504, subsection (12), R. R. S. 1943, is authorized by section 3-507, R. S. Supp., 1965. The pledge of future taxes under a valid, existing law is no different than the pledging of future revenue and other income.

9. **Constitutional Law: Taxation.** The tax levied pursuant to section 3-504, subsection (12), R. R. S. 1943, is not a violation of Article XIII, section 2, of the Constitution of Nebraska, prohibiting donations by a city for works of internal improvement without having been submitted to the qualified electors of the city at an election held by authority of law.

10. **Constitutional Law: Statutes.** Chapter 3, article 5, R. R. S. 1943, does not violate Article III, section 14, of the Constitution of Nebraska, in that it amends certain sections of Chapter 18, article 15, R. R. S. 1943, without specifying the sections amended and without repealing the sections amended.

Appeal from the district court for Webster County: NORRIS CHADDERDON, Judge. Affirmed.

William G. Cambridge, for appellant.

Bernard Sprague and Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellees.

Frederick A. Brown, for amicus curiae.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

CARTER, J.

The plaintiff, as a resident taxpayer of the city of Red Cloud, brought this action against the Airport Authority of the City of Red Cloud and the First Nebraska Securities Corporation to enjoin the issuance and sale of bonds in the amount of $18,000 by the Airport Authority for the reason that such issuance and sale is in violation of the Constitution and statutes of Nebraska. The trial court found for the defendants, denied the injunction, and dismissed the action. Plaintiff has appealed.

On February 4, 1965, the securities corporation sub-

mitted a bond purchase proposal to the Airport Authority for the purchase of bonds in the amount of $18,000 with interest at 3⅞ percent per annum, computed over the full life of the bonds. The proposal was accepted on the same day by the Airport Authority. The Airport Authority desires to issue and sell the bonds. On April 2, 1965, the Airport Authority adopted a resolution to issue the bonds in the amount of $18,000 for sale to the securities corporation. Before the bonds were registered or delivered, the present action was commenced.

Under the provisions of section 3-502, R. R. S. 1943, a city operating an airport is authorized to create an airport authority to be managed by a board of five members. Such board shall be a body corporate and politic, constituting a public corporation and an agency of the city establishing it. The board and its corporate existence shall continue for 20 years and until all its liabilities have been met and its bonds paid. Upon such termination of the airport authority all rights and property of the authority pass to and vest in the city. It is provided in section 3-504, subsection (12), R. R. S. 1943, that the authority shall have the power to certify annually to the governing body of the city the amount of tax to be levied for airport purposes, not exceeding one mill on the dollar upon the assessed valuation of all taxable property in the city, except intangible property, to be levied, collected, and paid to the account of the authority. By section 3-507, R. S. Supp., 1965, the authority is empowered to issue its negotiable bonds for any corporate purpose in such amounts as are required to carry out the purposes of the authority, such bonds to be general obligations of the authority payable out of any revenue, income, receipts, profits, or other money of the authority. The resolution authorizing the issuance of bonds may contain covenants and agreements by the authority to protect and safeguard the security and payment of the bonds which shall be a part of the contract

with the holders of the bonds. It is provided by section 3-509, R. R. S. 1943, that the bonds, notes, and other obligations of an authority shall not be a debt of the state or of the city in which the authority is established and shall not be paid out of any funds other than the funds of the authority.

In its resolution authorizing the issuance of the bonds, it is recited that the airport authority was lawfully created, that plans for a new landing strip have been approved by the state and the Federal Aviation Agency, and that each of the latter has made a grant to pay part of the cost of the project. The resolution further states the necessity to issue its negotiable bonds to pay its share of the cost to be called "Airport Authority of the City of Red Cloud, Nebraska Airport Revenue Bonds." By its resolution, the airport authority entered into covenants pledging that the bonds would be paid from a tax levied to the extent provided by law, together with other fees, rentals, revenue, or money of the airport authority.

It is the contention of the plaintiff that the issuance of the bonds is unlawful for the following reasons: (1) That section 3-504, subsection (12), R. R. S. 1943, is violative of Article VIII, section 7, of the Constitution of Nebraska, in that it purports to impose a tax on the city, or the inhabitants or property thereof, contrary to such constitutional provision; (2) that the pledging of the one mill tax and its covenant to levy such tax until the bonds are fully paid constitute an obligation of the city contrary to section 3-509, R. R. S. 1943; (3) that the pledging of the one mill tax is not a pledge of revenue, income, receipts, profits, or other money of the airport authority within the meaning of section 3-507, R. S. Supp., 1965, and therefore exceeds the authority given by the statute; (4) that the pledging of the tax on the property within the city to the maximum provided by law until the bonds are fully paid is in violation of section 3-507, subsection (3)(a), R. S. Supp., 1965, and

section 3-509, R. R. S. 1943, and sections 18-1502, 18-1503, and 18-1505, R. R. S. 1943; (5) that section 3-504, R. R. S. 1943, contravenes Article XIII, section 2, of the Constitution of Nebraska, prohibiting donations to works of public improvement without a vote of the people of the city; (6) that the Airport Authority Act amends sections 18-1502, 18-1503, and 18-1505, R. R. S. 1943, without repealing the sections so amended contrary to Article III, section 14, of the Constitution of Nebraska; and (7) that the Airport Authority Act delegates legislative power to the airport authority in violation of Article II of the Constitution of Nebraska, and deprives plaintiff of his property without due process of law contrary to Article I, section 3, of the Constitution of Nebraska, and takes the property of the plaintiff without just compensation contrary to Article I, section 21, of the Constitution of Nebraska. For the above reasons, plaintiff contends the applicable Airport Authority Act is unconstitutional and, if not, the proposed issuance of bonds is not authorized by the act and should be held void because of a fatal noncompliance therewith.

The Airport Authority is a public corporation and an agency of the city. Its creation is for a public purpose. The bonds issued are to be used in paying for land taken by the authority by eminent domain. Grants of funds by the state and federal governments have been approved and together with the proceeds derived from the bonds constitute the full payment price of the land. The authority uses its income from rentals, charges, and sales to maintain and operate its airport. In addition thereto it is authorized to certify to the city an amount not exceeding one mill on the dollar of the assessed valuation of the property in the city, except intangible property, to aid in the cost of operating the airport. The city makes the levy, collects the tax, and pays it to the authority as a part of its ministerial duties required by law.

An airport authority is a proprietary activity and

not a governmental one, even though it is a public corporation engaged in a public purpose. Brasier v. Cribbett, 166 Neb. 145, 88 N. W. 2d 235, and cases therein cited. In Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558, this court said: "The powers granted to a municipal corporation can be divided into two general classes,—the one including those which are legislative, public or governmental, and import sovereignty; the second, those which are proprietary or quasi private, conferred for the private advantage of the inhabitants and the city itself as a legal entity. Where the legislature creates a separate municipal corporation to perform the functions of a city usually regarded as proprietary, such municipal agency is just as much engaged in proprietary functions as if the city was doing it itself."

It is provided by Article VIII, section 7, of the Constitution of Nebraska, as follows: "Private property shall not be liable to be taken or sold for the payment of the corporate debts of municipal corporations. The Legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

It is contended that section 3-504, subsection (12), R. R. S. 1943, is in violation of the foregoing constitutional provision. The statute provides: "Any authority established under the provisions of this act shall have power: * * * (12) To certify annually to the governing body of the city the amount of tax to be levied for airport purposes, not to exceed one mill on the dollar upon the assessed valuation of all the taxable property in such city, except intangible property, and the governing body shall levy and collect the taxes so certified at the same time and in the same manner as other city taxes are levied and collected, and the proceeds of such taxes when due and as collected shall be set aside and deposited in the special account or accounts in which other revenues of the authority are deposited; Provided,

the provisions of this subdivision shall not apply to cities of the metropolitan class; * * *."

The powers of the Legislature are divided into two general classes, governmental and proprietary, or, as otherwise sometimes described, the police power and the corporate power. The proprietary power is a corporate power, and is the power to which the Constitution of Nebraska by Article VIII, section 7, refers when it states that the Legislature shall not impose taxes upon municipal corporations, its inhabitants or property, for corporate purposes. It is the law of this state that the proprietary interests of a city may not be supported by taxation unless authorized by local authority. On this point, it was held in Campbell County v. City of Newport, 174 Ky. 712, 193 S. W. 1, L. R. A. 1917D 791: "Under section 181a of the constitution the legislature has no power to levy a tax on local communities for local purposes, but may authorize such communities to tax themselves."

This question was resolved in Metropolitan Utilities Dist. v. City of Omaha, 112 Neb. 93, 198 N. W. 858. In that case, the Legislature created the Metropolitan Water District of the city of Omaha, which included the city of Omaha and neighboring cities and towns. In 1919, the act creating the water board was amended, which amendment contained the following provision: "Said district shall also lower water mains and reset hydrants at their original locations whenever necessary: Provided, that the cost thereof shall be paid by the respective municipalities." In 1921, the name of the water district was changed to Metropolitan Utilities District and it controlled the water system of Omaha and a gas system which had been acquired by condemnation. It became necessary that certain gas and water mains be lowered and hydrants reset. The utilities district performed the work and then sought recovery therefor from the city. The city contended that the statute requiring the city to pay such cost was in violation of

Article VIII, section 7, of the Constitution of Nebraska. In sustaining the invalidity of the statute, the court said: "In this case, we are of the opinion that the phrase, 'for corporate purposes,' as used in the constitutional provision above quoted, does not include purposes and activities designed, in the main, to aid or assist the state in carrying out its governmental activities, functions and policies, but is limited to those municipal activities designed, in the main, for the principal or exclusive benefit of the municipality, of its citizens and inhabitants. The legislative act, seeking to impose upon metropolitan cities the burden of paying the cost of lowering gas and water mains and resetting of hydrants, violates section 7, art. VIII of the Constitution, and is therefore invalid."

The Metropolitan Utilities District case makes it clear that the Legislature may impose taxes on a municipality for the purpose of carrying out the governmental powers of the city. Local authorities cannot be permitted to determine for themselves whether or not they will contribute through taxation to the support of local government generally involving the expenses of municipal government and the police power delegated to it. In preserving the peace, or maintaining a fire or police department, or improving its streets, or other strictly governmental functions, the state may exercise compulsory authority. In the levying of taxes for such governmental purposes of general concern, the municipality cannot demand a right to be consulted as its consent is immaterial.

But municipalities have other objects and purposes, purely local, in which the state at large is no more concerned than it is in the private concerns of its citizens, except in conferring power and regulating its exercise. These powers are spoken of as proprietary or corporate, and are usually placed on the same footing as private corporations. It is the exercise of these powers which the Legislature may not force upon a municipality or impose taxes upon it, its citizens, or property without

local consent. The purpose of Article VIII, section 7, of our Constitution, was to inhibit the Legislature from imposing taxes upon municipalities, its inhabitants, or property, for such corporate purposes. People ex rel. Board of Park Commissioners v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202.

A municipality is a creature of the Legislature and derives its powers from that source. It has no power to levy taxes in the furtherance of its local concerns unless such power has been delegated to it. Section 3-504, subsection (12), R. R. S. 1943, authorizes the airport authority to impose a tax in a maximum amount of one mill on the tangible property of the city. The authority is a separate entity, an agency of the city, and, in matters pertaining to the airport, has the same authority that a city would have in dealing therewith. The section of the statute under discussion does not impose a tax on the local authority, but merely authorizes the local authority, in its discretion, to tax itself by levying a tax on the tangible property of the city. Such a tax is not in violation of Article VIII, section 7, Constitution of Nebraska, nor does it violate Article I, sections 3 and 21, Article II, or Article VIII, section 1, Constitution of Nebraska, nor the Fourteenth Amendment, section 1, to the Constitution of the United States.

The resolution of the board of the airport authority, providing for the issuance of the bonds, contains the following provisions: "The Airport Authority of the City of Red Cloud, Nebraska covenants that while the bonds authorized hereunder or any of them remain outstanding or unpaid, that it will certify to the Governing Body of the City of Red Cloud, Nebraska, as long as any Bonds issued herein are outstanding, a tax to the maximum extent provided by law, and that the Authority further covenants that it will from time to time establish, maintain and collect fees, rentals and other charges for the use and occupancy of the facilities and for all services, which together with the tax levy

referred to above, shall be sufficient to pay the principal of and interest on said bonds and to operate said airport facilities. In the event of any changes of method of assessment of property for taxation, the Authority will certify up to what one (1) mill tax would raise as of the date of this ordinance. Said bonds do not constitute an indebtedness of the City of Red Cloud, Nebraska, within the meaning of any constitutional or statutory limitation, but shall constitute general obligations of the Airport Authority of the City of Red Cloud, Nebraska. * * * The Airport Authority of the City of Red Cloud, Nebraska hereby pledges and hypothecates the revenues and earnings derived and to be derived from any source whatsoever, including any additions and improvements constructed thereto, for the payment of said bonds, both principal and interest. * * * The pledge hereunder of revenues and earnings derived and to be derived from the operation of said airport facilities and all extensions and improvements thereof for the payment of principal and interest on the bonds issued hereunder shall be on the gross revenues of said Authority and shall be prior and superior to amounts required for operation and maintenance of said facilities."

In the form of bond provided in the resolution, the following appears: "This bond is payable solely from a tax levied to the extend (sic) provided by law and the Authority covenants that such tax, together with other fees, rentals and revenues or moneys shall be sufficient to pay the principal of and interest on this bond and the series of which it is a part, and is issued under authority of the provisions of Article 5, Chapter 3, Reissue Revised Statutes of Nebraska, 1943, and all laws amendatory thereof and supplementary thereto, for the purpose of paying the cost of acquiring land and constructing thereon a landing strip and doing other work necessary and incidental thereto, and this bond does not constitute an indebtedness of said City of Red Cloud, Nebraska, within

any constitutional or statutory limitation. * * * Under said laws and the resolution authorizing this issue of bonds, the monies received from a tax levied to the extent provided by law together with all other fees, rentals and revenues shall be deposited in a separate fund designated as the 'Airport Authority of the City of Red Cloud Revenue Fund' of said Airport Authority, which shall be used only for paying the principal of and interest on all bonds of said Authority that are issued under authority of said laws and all amendments thereto are payable by their terms only from said tax, fees, rentals and revenues of said Airport Authority, and for providing for reserves therefor. * * * The Airport Authority of the City of Red Cloud, Nebraska covenants to certify annually to the Governing Body of the City of Red Cloud, Nebraska, as long as any of the bonds of this issue remain outstanding, a tax to the maximum extent provided by law. In the event of any changes of method of assessment of property for taxation, the Authority will certify up to what one (1) mill would raise as of the date of this ordinance, and to maintain rates and charges sufficient in amount, which together with the tax, will be sufficient to pay the principal of and interest on this bond as the same becomes due."

It is urged by the plaintiff that the foregoing provisions of the resolution and bonds are violative of section 3-509, R. R. S. 1943, which provides: "The bonds, notes, and other obligations of an authority shall not be a debt of the State of Nebraska or of the city in which such authority is established, and neither the state nor the city shall be liable thereon, nor shall such bonds be payable out of any funds other than funds of the authority issuing same."

It is shown by the record that the pledge of revenue, income, receipts, profits, or other money of the authority, as provided by section 3-507, R. S. Supp., 1965, without the inclusion of the proceeds of the one mill tax provided for in section 3-504, subsection (12), R. R. S.

1943, is insufficient to fund the bonds, and without the inclusion of the tax the sale of the bonds to First Nebraska Securities Corporation cannot be made. The amount to be certified to the city to be levied on the tangible property of the city is for the purpose of carrying on the airport facility. It is not levied for the primary purpose of providing for the funding of bonds. The money derived from this tax is a part of the money provided for the construction, operation, and maintenance of the airport facility. It is a part of the funds of the authority and is not at any time funds of the city although the city performs the ministerial duty of levying, collecting, and paying the tax to the authority. The tax can be levied whether or not the bonds are issued. The tax is in effect that of the authority, a separate entity, a public corporation, and an agency of the city. It is in no sense of the term a city tax, and when the city performs its ministerial functions with reference to its levy, collection, and payment over, the city's responsibility ceases, and no obligation remains. The bonds are general obligations of the authority and not the city. The provision of section 3-509, R. R. S. 1943, that the bonds of the authority shall not be a debt of the city has not been violated for the reason that the city is under no obligation to pay the bonds.

We find no merit in the contention that the authority cannot pledge the funds received from the one mill levy until the bonds are paid. It is customary for bonds of municipalities to be funded by the levy of taxes over a period of years. It would seem that the funds derived from future levies could be pledged the same as future rentals or other income. We think it was the intention of the Legislature to include such a tax as that authorized by section 3-504, subsection (12), R. R. S. 1943, when it provided by section 3-507, R. S. Supp., 1965, that such bonds be general obligations of the authority payable out of any "revenue, income, receipts, profits, and other money derived by the authority."

It is also asserted that section 3-504, subsection (12), R. R. S. 1943, is violative of Article XIII, section 2, of the Constitution of Nebraska, in that it amounts to a donation by the city for a work of internal improvement without having been submitted at an election to the qualified electors of the city. The answer to this contention is that the city has not made a donation to the authority, or, for that matter, made any payment to the authority at all. The tax for all practical purposes was made by the authority upon the tangible property of the city. The city has no interest in the tax other than to perform its ministerial duties with reference thereto.

It is contended that Chapter 3, article 5, R. R. S. 1943, is unconstitutional in that it amends Chapter 18, article 15, R. R. S. 1943, without specifying the amended sections, and without repealing the sections amended contrary to Article III, section 14, Constitution of Nebraska. Chapter 3, article 5, R. R. S. 1943, deals with the power of cities to acquire aviation fields. Chapter 18, article 15, R. R. S. 1943, deals with airport authorities. The subjects are different. Chapter 3, article 5, R. R. S. 1943, is an independent act dealing with a different subject than Chapter 18, article 15, R. R. S. 1943, and the provisions of Article III, section 14, of the Constitution of Nebraska, are not applicable.

We have examined the assignments of error not discussed herein and find no merit in them. The bonds in question were issued in accordance with the controlling law as the trial court found. Our views being in accord with those of the trial court, we conclude that that court properly denied an injunction and dismissed the action.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL REDDEN, APPELLANT.

149 N. W. 2d 98

Filed March 3, 1967. No. 36394.

1. **Criminal Law.** It is only when there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
2. ———. This court in a criminal action will not interfere with the verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
3. ———. One who incites or instigates the commission of a felony when he is neither actually nor constructively present is an aider, abettor, or procurer within the meaning of section 28-201, R. R. S. 1943.
4. ———. Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Thomas P. Lott, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

NEWTON, J.

Defendant, on trial to a jury, was convicted of breaking and entering a filling station. The proprietor of the station testified that the evening before he had closed and locked the station and that the doors and windows were then intact. The following morning the police requested him to appear at the station at which

time he found a large window had been broken in one of the doors of sufficient size to permit entrance by the defendant or an accomplice. He also made keys and had a number of them lying around inside the station. There was a wall safe in the station with a key lock. A key had been inserted in the lock and broken off so that part of it remained in the lock and part of it was lying on the floor. The only thing taken was a defaced coin from the cash register, all other money being in the wall safe to which entrance was not gained.

Two accomplices of the defendant testified at his trial. One, Sam Pittman, stated that he had met the defendant and David James Klimuik late the night before or early on the morning that the station was entered. About 5 o'clock a.m. they drove to the corner of Seventeenth and Vinton Streets in Omaha in an automobile operated by the defendant, got out, and walked to the station at Sixteenth and Vinton Streets. As they walked towards the station, either the defendant or David James Klimuik was carrying a tire iron taken from the automobile. He did not recall hearing any particular conversation about what they were to do at the station, but he knew they were going there for the purpose of "breaking and entering" and to take property in the station. He stayed around the corner from the station and heard glass breaking in front of the station, having been told by the defendant and David James Klimuik to remain there to inform them if he saw "cops or anything." Soon after he heard the glass break, he saw police officers and proceeded to run away, but was apprehended in company with the defendant at the corner of Seventeenth and Vinton Streets. He further stated that he was well acquainted with both the defendant and Klimuik. The defendant and Klimuik had not met until the preceding evening.

The witness, David James Klimuik, testified about meeting the defendant and Sam Pittman during the late hours of the preceding day and the early morning

hours of the day on which the offense occurred. The defendant had taken a tire iron from a car which the defendant carried with him as the three walked to the station. On arriving at the station, the defendant broke out the window and the witness, Klimuik, climbed through the window to the interior of the station and looked around for money or other property of interest. He did not find anything but noticed the wall safe and went back to the door to talk to the defendant who was standing on the outside, adjacent to the door. The defendant told him to look for a key and try to open the safe. The witness found a key but on trying it in the lock of the safe, the key broke and he dropped part of it on the floor. They then saw the police and proceeded to run, the witness taking a different direction than that taken by the defendant and Pittman but being likewise apprehended. He further stated that the defendant never entered the station and that the only money found was a defaced nickel which was found on the witness Klimuik at the time of his arrest. He further stated that he was wearing a white jacket at the time in question and that the defendant and Sam Pittman were wearing dark jackets.

John M. LeHoyutak, a police officer, was called and stated that he was in a cruiser on the morning in question operated by another policeman. They were in the vicinity of the station at Sixteenth and Vinton Streets at about 5 o'clock a.m. when they saw a party to the west of the station and two who appeared to be inside the middle door of the station. He identified the first as Sam Pittman and stated that he saw the defendant run from the front of the station and kept the defendant in sight until defendant and Pittman were arrested at Seventeeth and Vinton Streets. Defendant and Pittman were dressed in black jackets and Klimuik in a white jacket. On further investigation he ascertained that the window in the east bay door of the station had been broken, but no tire iron was found.

The defendant also testified and told substantially the same story as Pittman and Klimuik about meeting earlier, driving in an automobile to the vicinity of the gas station, and as to the three of them walking to the station; and admitted there had been some conversation in a pool hall earlier in the evening about breaking into the station. Defendant also testified that he was on the station property within 5 or 6 feet of the building, but stated that when he heard the glass crack, he turned to walk away. He said he did not see a tire iron and that he had persistently informed Pittman and Klimuik that he did not want anything to do with breaking into the station.

The defendant's principal assignment of error is that the evidence is not sufficient to sustain the verdict of the jury. It would clearly appear that the evidence above outlined is ample to justify a submission of this case to the jury. The evidence of the defendant's accomplices definitely involves him in the planning and execution of the offense, and the independent evidence of the arresting officer places the defendant at the immediate scene at the time the offense occurred. The only evidence in contradiction thereof is that of the defendant who himself does not deny being at the scene at the time of the offense and whose conduct was obviously not found by the jury to be that of an innocent individual.

"It is only when there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty." Sherrick v. State, 157 Neb. 623, 61 N. W. 2d 358. "This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to

support a finding of guilt beyond a reasonable doubt." Texter v. State, 170 Neb. 426, 102 N. W. 2d 655.

Defendant also assigns as error the giving of instruction No. 6 of the trial court. That instruction sets out the words of the statute with reference to one who "aids, abets or procures" another to commit an offense; defines the word "accomplice"; and defines the word "abettor" as follows: "An 'abettor' is one who is actually or constructively present at the commission of the deed and contributes to it by moral or physical force." The instruction concludes with the following paragraph: "You are further instructed that aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was any express agreement therefor." It is well established that the use of physical force is not required to constitute one an aider and abettor. The statute itself states that it is sufficient if one "procures" another to commit an offense. § 28-201, R. R. S. 1943. "One who incites or instigates the commission of a felony when he is neither actually nor constructively present is an aider, abettor or procurer within the meaning of section 8579, Rev. St. 1913." Neal v. State, 104 Neb. 56, 175 N. W. 669.

Another assignment of error is that the sentence of not less than 2 nor more than 4 years in the Nebraska Penal and Correctional Complex is excessive. "Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion." Salyers v. State, 159 Neb. 235, 66 N. W. 2d 576. See, also, Hyslop v. State. 159 Neb. 802, 68 N. W. 2d 698. No abuse of discretion appears here.

In argument, defendant intimated that defendant's

civil rights had been prejudiced by his examination at the police station following the arrest. No assignment of error was made in this regard and ordinarily matters considered by the court are confined to those so assigned. However, in this instance, an examination of the record does not disclose that any prejudicial admissions obtained from the defendant, if any were, were introduced at his trial.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

LAURETTA DITTRICK, APPELLEE, V. CLEO E. DEUEL, APPELLANT.

149 N. W. 2d 57

Filed March 3, 1967. No. 36401.

1. **Trial: Appeal and Error.** Instructions should be considered together in order that they may be properly understood and when, as an entire charge, they properly submit the issue to the jury, the verdict will not be set aside.
2. **Automobiles: Trial.** An instruction reciting the provisions of statutes and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question.
3. **Trial: Appeal and Error.** Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one.
4. **Highways: Automobiles.** If a graveled road is a part of the state highway system a speed of 60 miles per hour is not violative of the specified maximum speed.

Appeal from the district court for Madison County: FAY H. POLLOCK, Judge. Affirmed.

Jewell & Otte, for appellant.

Deutsch & Hagen, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and WEAVER, District Judge.

WEAVER, District Judge.

Lauretta Dittrick, as plaintiff, commenced this action against Cleo E. Deuel, as defendant, to recover for injuries to herself, repairs for the family car, and medical and hospital services for herself and minor daughter who was a passenger in the car driven by plaintiff. Plaintiff's husband executed the necessary assignments to facilitate recovery. The issues were joined by the filing of defendant's answer and cross-petition and the filing of plaintiff's reply and answer. The jury returned a verdict for plaintiff. Defendant filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, the same was overruled, and the defendant has appealed.

The accident happened at about 2 p.m. on August 27, 1963, on a well-maintained graveled country road, running north and south, and described as a cut-off between Battle Creek and Pierce, Nebraska. It was a sunny, dry day and as plaintiff drove her 1959 Ford sedan north it was in collision with a farm tractor driven by defendant Deuel, which came onto the road from a farm driveway on the west side of the road. The road was level for some distance north and south of the driveway but the driveway was considerably obscured by trees and brush. There was a deep ditch and weeds on the east side of the road and some evidence of gravel ridges on each side of the road leaving approximately 18 feet of driveable roadway.

Plaintiff testified that she was driving on her own side of the road at between 40 and 45 miles an hour when the tractor came out of the driveway. Defendant did not see plaintiff's car until he heard the horn blow. At that time he was still in the driveway and estimated plaintiff's speed at "probably" 60 miles an hour. Neither the car nor tractor was able to stop in

time to avoid a collision. Defendant offered evidence to indicate plaintiff's car was as much as 2 feet over on the west side of the road at the time of impact, and that his tractor was on its own west side of the road at time of impact.

Defendant's first assignment of error goes to the fact that the trial court refused to direct a verdict for defendant or dismiss plaintiff's petition based on the holding in Hilferty v. Mickels, 171 Neb. 246, 106 N. W. 2d 40. While the Hilferty case is similar in many respects, the crucial point is that in the Hilferty case it was *undisputed* that the plaintiff was on the wrong side of the road. This court properly found that he was not entitled to recover. In the instant case plaintiff's testimony was that she was on her own side of the road. This question then was for the jury to consider. The assignment of error is without merit.

Plaintiff and defendant charged each other with failure of lookout, failure of control, and failure to drive on the right side of the road. The terminology used by the parties was different and the trial court paraphrased all of the allegations of negligence made by each party and put them in more uniform language. This the court had a right to do. When considered together as an entire charge they properly submitted the issues to the jury. "Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issue to the jury, the verdict will not be set aside." Beavers v. Christensen, 176 Neb. 162, 125 N. W. 2d 551. Instructions must be considered as a whole, and if when construed together they properly state the law, they are sufficient and error cannot be predicated thereon. O'Brien v. Anderson, 177 Neb. 635, 130 N. W. 2d 560; Brunselmeyer v. Hill, 179 Neb. 140, 137 N. W. 2d 354; Younker v. Peter Kiewit Sons Co., 180 Neb. 835, 146 N. W. 2d 202.

Complaint is made that the court failed to properly instruct on the question of right-of-way. The court in

its instructions set forth the following sections of the statutes:

"The driver of a motor vehicle shall drive the same upon the right half of the highway.

"Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main traveled portion of the roadway as nearly as possible. * * *

"The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on such public highway. * * *

"No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing."

"An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable *statutory* limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question." Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538. See, also, Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333. Defendant cites no other applicable statutory law. We believe the instructions given, when read together, correctly reflect the law applicable to the situation in this case. The defendant tendered no instruction. "Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one." Younker v. Peter Kiewit Sons Co., *supra.*

Defendant sets out in his brief as applicable law in this case subsection (1)(c) of section 39-723, R. S. Supp., 1961, "that no person shall operate a motor vehicle at a rate of speed exceeding 50 miles per hour upon any graveled highway *not a part of the state highway system.*" (Italics supplied.) Defendant alleged that plaintiff "was traveling at a speed in excess of the speed limit of 50 miles per hour upon *country* roads." (Italics sup-

plied.) The evidence showed that the road in question was a well-maintained country graveled road, a short cut from Battle Creek to Pierce, Nebraska. It was not shown whether or not it was part of the state highway system. If a graveled road is a part of the state highway system a speed of 60 miles per hour is not violative of the specified maximum speed. Defendant did not allege and did not prove that the highway herein involved was not a part of the state highway system. The cited section of the law is not applicable and the assignment of error is without merit.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

FARMERS CO-OP COMPANY, HOOPER, NEBRASKA, APPELLANT, V. COUNTY OF DODGE, NEBRASKA, APPELLEE.

148 N. W. 2d 922

Filed March 3, 1967. No. 36410.

1. **Counties: Highways.** A county is not required to keep its highways in condition fit for travel for their entire statutory width; its duty being discharged if a width sufficient for travel is kept in proper condition.
2. ———: ———. A county's duty is discharged if the traveled portion of a road is of a width sufficient for travel and maintained in a proper condition, and such county is not liable when a person suffers damage as a result of deviating from the traveled portion of the roadway.
3. ———: ———. Plaintiff must prove, even if a defect in the traveled portion of the roadway existed, that the county had actual notice of such defect or that it existed for such a length of time that with reasonable diligence it could or should have been discovered by the county.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Homer E. Hurt, Jr., for appellant.

Cassem, Tierney, Adams & Henatsch and John B. Henley, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

WHITE, C. J.

On July 31, 1965, plaintiff's tank truck, weighing 8 or 9 tons, overturned into a ditch at the northeast corner of a bridge on a graveled county road in Dodge County, Nebraska. In this suit for property damages, plaintiff alleged negligence on the part of the county "by failing to properly and adequately support the dirt placed there as a shoulder of said road." At the close of plaintiff's evidence, the trial court directed a verdict for the defendant county, and the plaintiff appeals. We affirm the judgment.

The liability of a county in such a situation is governed by section 39-834, R. R. S. 1943, which provides for damages if they "accrue in consequence of the insufficiency or want of repair of a road or bridge, * * *." This statute, in derogation of the common law, must be strictly construed and the scope of the county's liability, as pertinent here, is defined in Kudrna v. Sarpy County, 125 Neb. 83, 249 N. W. 87, as follows: "The rule is stated that a county is not required to keep its highways in condition fit for travel for their entire statutory width; *its duty being discharged if a width sufficient for travel is kept in proper condition.* Howard v. Flathead Independent Telephone Co., 49 Mont. 197. See, also, 5 Thompson, Negligence (2d ed.) sec. 6008; Moran v. Palmer, 162 Mass. 196; Carey v. Hubbardston, 172 Mass. 106; Hall v. Wakefield, 184 Mass. 147. A county has sufficiently discharged its duty when the traveled portion of a highway is maintained in a proper condition, * * *." (Emphasis supplied.) See, also, McKinney v. County of Cass, 180 Neb. 685, 144 N. W. 2d 416. It therefore appears that a county's duty is discharged if the traveled portion of a road is properly maintained and is of a width sufficient

for travel, and such county is not liable when a person suffers damage as a result of deviating from the traveled portion of the roadway.

Plaintiff's driver, Elmer Dasenbrock, was proceeding north, the graveled road was very wet from a rain the night before, and there was a 1½ to 2 foot windrow of gravel in the center of the road. As plaintiff's driver entered the south edge of the bridge, he met a highway patrolman coming south (the officer testified they passed 20 feet south of the bridge), the roadway and bridge were level, and the front right wheel of the truck pulled to the right and east as he was crossing the bridge. The truck continued to the north, and the front end cleared the north end of the bridge, the right side of the truck striking the northeast corner of the bridge, and then proceeded on and overturning in the right-hand ditch. Dasenbrock testified there was a "traveled" and "untraveled" portion of the road. The width of the bridge is 26 feet, with 22 feet of it being the traveled portion. Plaintiff's truck was 7 feet wide and the patrolman's car was 6 feet wide. The traveled portion of the road was light in color and the untraveled portion was very wet and dark in color. The wet, black, untraveled portion consisted of loose dirt. Dasenbrock testified, in an interrogatory, that the loose dirt with relation to the east shoulder of the road "actually was the shoulder of the road." All of the loose dirt was on the untraveled portion of the road.

The undisputed evidence of patrolman Yosten, plaintiff's witness, who made appropriate measurements, is that plaintiff's vehicle was traveling with its right wheels off the traveled portion of the road and on the shoulder of the road for a measured distance of 100 feet to the south. The vehicles passed without any difficulty; the plaintiff's vehicle had the entire east side of the road. When Yosten first saw plaintiff's vehicle, it was on the traveled portion of the road. The evidence is undisputed that there was no defect or "insufficiency" in the main-traveled portion of the roadway.

Summarizing, there is neither allegation nor evidence of any defective condition of the traveled portion of the roadway; that all loose dirt was on the shoulder of the road or at the corners of the bridge and off the traveled portion of the roadway; that the accident occurred while plaintiff's driver was traveling on the shoulder and off the traveled portion of the roadway; and that there was ample room on the roadway for both vehicles to pass without the necessity of either vehicle leaving the traveled portion of the roadway. The county's liability is limited to defective conditions in the traveled portion of the road. There was an entire failure by the plaintiff to sustain its burden of proof and the trial court properly directed a verdict for defendant.

Plaintiff contends, in its brief, that its truck began to sink into a hole which had been caused by washing and which had recently been filled by a county truck dumping dirt in it. Plaintiff offers no citation in the record for this claim. The pictures, taken by patrolman Yosten and produced in evidence, show the continuing tire marks of plaintiff's vehicle until it left the road and do not support such a claim. The pictures show no "hole" or washed-out place but they do show a continuous tire impression of even depth through loose dirt on the shoulder of the road. Further, the only testimony of the dumping of loose dirt was by the witness Moeller who repeatedly made it clear that he did not know whether the county had dumped loose dirt before or after the accident. He identified the place where the dirt was dumped as being immediately north of the concrete abutment of the bridge and at a place off the shoulder of the road. The record does not sustain this contention, and even if it did, its location would undisputedly be off the main-traveled portion of the road.

Plaintiff must prove, even if a defect in the traveled portion of the roadway existed, that the county had actual notice of such defect or that it existed for such a length of time that with reasonable diligence it could

or should have been discovered by the county. Wittwer v. County of Richardson, 153 Neb. 200, 43 N. W. 2d 505. No notice, written or oral, was received by the county in this case of the loose dirt. As mentioned the sole evidence in this respect was that of the witness Moeller who testified repeatedly that he did not know whether the dumping of dirt was before or after the accident and the place where he saw it dumped (marked "x", exhibit 5) was off the roadway and on the right edge of the shoulder of the road. Plaintiff has failed to meet its burden of proof in this respect also.

In the light of what we have said it is unnecessary to discuss the issue of contributory negligence of plaintiff's driver in deviating from the traveled portion of the roadway and driving on the wet shoulder of the road. For the reasons given the action of the district court in directing a verdict was correct and is affirmed.

AFFIRMED.

DERALD E. WARREN, APPELLANT, V. LINDA M. WARREN, APPELLEE.

149 N. W. 2d 44

Filed March 3, 1967. No. 36417.

1. **Divorce.** In a divorce suit a good reason for modification of a decree that awarded custody of minors to their grandparents is changed circumstances that substantially affect the welfare of the minors.
2. **Attorney and Client.** An allowance for attorney's fees as costs is erroneous unless it is permitted by statute or uniform practice.
3. **Divorce: Attorney and Client.** Section 42-308, R. R. S. 1943, which authorizes allowances to the wife in a divorce suit, does not permit an allowance for attorney's fees to grandparents who are parent-surrogates.

Appeal from the district court for Red Willow County: VICTOR WESTERMARK, Judge. Affirmed as modified.

William W. Lyons, for appellant.

LaFayette D. Hurley, for appellee.

Perry W. Phillips, for Spaths.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

SMITH, J.

As an aftermath of divorce this controversy over custody of minors arose between the maternal grandparents, William and Virginia Spath, and the father, Derald E. Warren. The district court continued custody of two children in the Spaths, who were allowed $100 for an attorney's fee. A concomitant transfer of two other children to Derald resulted from stipulations approved by the court. Derald has appealed.

Derald had obtained the divorce from Linda M. in March 1964. By the judgment she retained custody of their four children: Susan, age 4 years; Judy, age 3 years; Lester, age 2 years; and Mary, age 10 months. The following November the parents jointly moved to modify the custodial provisions, and the court approved. Placing Lester and Mary with the paternal grandparents, the court transferred custody of Susan and Judy to the Spaths. It also fixed the monthly support for each child at $35. In June 1966, the judgment under review was rendered after a hearing on the motion of Derald to regain custody of all four.

Derald had worked in Nebraska for a maximum wage of $70 per week up to August 1964. In debt and with $30 in his pocket he left to look for a better job. His present employment with Stepan Chemical Company began in April 1965. He is now a chemical operator earning approximately $145 per week. Owing one debt of an undisclosed amount but possessing $1,000, he hopes to buy a house. His home is a three-room apartment in Manhattan, Illinois, but two additional bed-

rooms are available. It is unlikely that the company will ask him to leave Manhattan.

Derald has been solicitous for the welfare of the children. He returned to Nebraska four or five times for visits. Lester and Mary lived with him 2 months of 1965, but Derald was compelled to send them back because a custodial plan failed. His interest was also shown by letters, gifts, and compliance with the judgment for support.

Linda Spencer married Derald in March 1966. Twenty years of age, she has a limited background for rearing children. She took care of small children 10 days while the mother was hospitalized. We assume that Linda S. undertook responsibility for Lester and Mary in June 1966. The chief uncertainties entertained by the trial judge and the Spaths are related to the youth and inexperience of Linda S. as well as to the relinquishment by Derald. The mother of the children consented to the requested transfer.

William Spath, a railroad employee, is subject to transfer. Between November 1964, and June 1966, the Spaths were compelled to move once or twice. Susan attended school in Concordia, Kansas, the first semester of one year, and in Cambridge, Nebraska, the second semester. Parental solicitude of the Spaths is admitted.

We note several considerations: Severe financial difficulties underlying relinquishment of custody by a parent. See, Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783; State ex rel. Britton v. Bryant, 95 Neb. 129, 145 N. W. 266. Strength of the bond between children and parent-surrogates. Danger of an experiment. State ex rel. Cochrane v. Blanco, 177 Neb. 149, 128 N. W. 2d 615. Opportunity of siblings to grow up together. See Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509. Permanence of physical environment and prospects for attachments outside the family. Emerson v. Quinn, 79 Idaho 358, 317 P. 2d 344. Parental faithfulness.

Changed circumstances that substantially affect the

welfare of minors are a good reason for modification of a custody award. See § 42-312, R. R. S. 1943. We review the record de novo. Without specialized expertise in the behavioral sciences we think that custody of Susan and Judy should be awarded to Derald.

The allowance for an attorney's fee was made to the Spaths alone, Linda M. appearing without counsel. Such an allowance is erroneous unless it is permitted by statute or uniform practice. Timmerman v. Timmerman, 163 Neb. 704, 81 N. W. 2d 135, 65 A. L. R. 2d 1372; Abramson v. Abramson, 161 Neb. 782, 74 N. W. 2d 919. The statute authorizing suit money for the wife applies to a mother, although she and grandparents are jointly represented by an attorney. § 42-308, R. R. S. 1943; Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847. That situation is distinguishable. The allowance to the Spaths was erroneous. See McGuire v. McGuire, 190 Kan. 524, 376 P. 2d 908.

The judgment is modified as follows: (1) Custody of Susan and Judy is awarded to Derald with permission for removal out of the state. (2) Derald shall return the children to Nebraska at least two times each year for visits with Linda M. and the Spaths. (The judgment has a similar provision concerning Lester and Mary.) (3) The provision for child support is vacated except for payments due prior to the date of our mandate. (4) The allowance of $100 for an attorney's fee is vacated. (5) Costs are taxed to the Spaths. The judgment, as modified, is affirmed, with costs in this court taxed to the Spaths.

AFFIRMED AS MODIFIED.

WILLIAM PLOUZEK, SR., ET AL., APPELLEES, V. SALINE COUNTY REORGANIZATION COMMITTEE OF SALINE COUNTY, NEBRASKA, ET AL., APPELLEES, IMPLEADED WITH CLARENCE GAUSMAN, APPELLANT.

149 N. W. 2d 919

Filed March 3, 1967. No. 36431.

1. **Schools and School Districts.** A county school district reorganization committee is the real party in interest in a contest over a reorganization plan submitted by it.
2. **Elections.** A party disputing the results of an election upon the basis that illegal votes were cast or legal votes rejected has the burden of showing not only that such votes were sufficient in number to change the result of the election, but that a change actually resulted therefrom.
3. ———. Electors whose legal votes were rejected may testify as to how they would have voted.

Appeal from the district court for Saline County: JOHN D. ZEILINGER, Judge. Affirmed.

Perry, Perry, Sweet & Witthoff, for appellant.

Jerry L. Snyder, for appellees Plouzek et al.

Clarence C. Kunc and Bernard J. Ach, for appellees Saline County Reorganization Committee et al.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

NEWTON, J.

This is an election contest. The record reflects the following facts.

The Saline County Reorganization Committee, defendant herein, proposed a school reorganization program and submitted the proposition to the voters concerned at a special election held on May 25, 1965, in Dorchester, Nebraska. The plan proposed that School Districts Nos. 44, 19, 1, 31, 25, 11, 94, and part of 64 be reorganized and designated as School District No. 44 of Saline County, Nebraska. At the time of the election, Elmer Kraus, Edward Kraus, Albie J. Kraus, Ester Zegers,

and Francis Zegers, qualified electors residing in that portion of district No. 64 not included in the reorganization plan, went to the place where voting was being conducted and attempted to vote, but the election officials erroneously believed that these individuals who did not reside within the area proposed to be reorganized were not entitled to vote and prevented their voting. Each of these individuals testified that they would have voted "against" the reorganization plan. Later on the day of election, the election officials discovered their mistake and attempted to contact these voters with a view to permitting them to vote, but none of them were able to return in time to do so. Two other individuals, Agnes O'Brien and James W. O'Brien, drove toward the polling place with the intention of voting, but they, too, resided in that portion of district No. 64 not included in the reorganization plan and on meeting the Krauses were informed that they would not be permitted to vote. On learning this, they returned to their home without having attempted to vote.

Maynard Hessheimer, who claimed to be a resident of district No. 31, attempted to vote and was challenged on the ground that he was not a resident of district No. 31 or of Saline County. The required statutory procedure was followed. He answered all questions propounded to him and took the oath provided by statute. He was then permitted to vote, but his vote was placed in a sealed envelope and was not counted when the results of the election were ascertained. Maynard Hessheimer was a single man of legal age, paying personal property taxes in district No. 31 of Saline County, but he had for a number of years made his home with his parents in Lancaster County and still received mail at his parents' address. It appears that he had been, for 2 or 3 years prior to the election, farming and residing with a married brother in district No. 31 of Saline County, notwithstanding which he had voted in Lancaster County in the 1964 fall election. He stated, however, when chal-

lenged, and called as a witness, that it was his intention to make his residence in district No. 31 of Saline County and that such had been his intention since he started farming and residing with the brother in that district.

The vote on the reorganization proposition resulted in 114 votes for the plan and 108 against the plan.

Plaintiffs are qualified electors of district No. 64 of Saline County. Defendants are the Saline County Reorganization Committee of Saline County, the officers and members of such committee, and the county superintendent of Saline County. On trial in the district court, the election was set aside.

Appellant's first assignment of error is based on the failure of the trial court to dismiss the action for failure to make real parties in interest parties defendant. It is now well settled that the County School District Reorganization Committee is the real party in interest in a contest over a reorganization plan submitted by it. Arends v. Whitten, 172 Neb. 297, 109 N. W. 2d 363.

Appellant's second assignment of error challenges the action of the trial court in receiving in evidence statements of the witnesses Edward Kraus, Elmer Kraus, Albie J. Kraus, Ester Zegers, and Francis Zegers to the effect that had they been permitted to vote, they would have voted "against" the reorganization plan. Section 32-1001, R. S. Supp., 1965, provides that one ground for an election contest shall be "when illegal votes have been received or legal votes rejected at the polls sufficient to change the result." The general rule is that a party who wishes to dispute an election upon the basis that illegal votes were cast has the burden of showing not only that they were sufficient to change the election but for which candidate they were cast. Mehrens v. Election Canvassing Board, 134 Neb. 151, 278 N. W. 252; State ex rel. Brogan v. Boehner, 174 Neb. 689, 119 N. W. 2d 147. A mere showing that enough illegal votes were cast or legal votes rejected to possibly change the result of

the election is not sufficient. It has been the policy to require a positive showing of a change in the result of the election by reason of such votes. Where illegal votes have been received, except in the case of absent or disabled voters' votes, this can only be done by ascertaining how those that cast the illegal votes voted or those whose legal votes were rejected would have voted. It is true that in one instance the voter testified regarding an accomplished fact whereas in the second instance, the testimony called for is one regarding intention, but in many cases, evidence of intention is received by the courts and there does not appear to be any valid reason for rejecting such evidence, the witnesses having waived any privilege or immunity which they might have claimed. Without such evidence, a contestant would find it impossible to comply with the requirement that he show for which candidate or proposition the votes were or would have been cast. This evidence was properly received.

Appellant contends that the evidence fails to satisfactorily establish that Maynard Hessheimer was a resident of district No. 31 in Saline County at the time of the election and consequently that his vote should not be counted. He testified positively that he was farming in district No. 31 of Saline County and had been for several years. He had property and paid taxes therein and resided in the home of his brother located therein and his evidence displays an intent to consider his brother's home as his place of residence. He took the oath required of a challenged voter. Section 32-478, R. R. S. 1943, provides that if any person challenged refuses to take the oath or affirmation, his vote shall be rejected. In this instance the evidence indicates that Maynard Hessheimer was actually residing in district No. 31 of Saline County with the intention of making such his permanent residence and that when challenged, he took the oath required of him. His vote should be counted.

Agnes O'Brien and James W. O'Brien, not having

offered to vote or having been denied the privilege of voting, are in the same position as any other elector who may have failed to vote at the election and how they would have voted cannot be considered.

The five votes of the Kraus and Zegers families which were rejected and which would have been cast "against" the reorganization plan and the vote of Maynard Hessheimer which was cast "against" the plan make a total of 6 votes and when added to the 108 votes cast "against" the plan, make a total of 114, the same number as that cast "for" the plan. It is, therefore, apparent that the proposed reorganization plan did not receive a majority of the votes proffered at the election and it should be set aside.

The judgment is affirmed.

AFFIRMED.

RICHARD RAFF, APPELLEE, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, APPELLANT.

149 N. W. 2d 52

Filed March 3, 1967. No. 36436.

1. **Insurance.** "Escape," as used in a theft policy pertaining to livestock, must be construed to mean straying from or leaving the place of confinement.
2. ———. "Mysterious disappearance," under the terms of a theft policy, means disappearance under unknown, puzzling, and baffling circumstances, which arouse wonder, curiosity, or speculation, or under circumstances which are difficult or hard to explain.
3. **Conversion.** "Conversion" is any unauthorized act which deprives the owner of his property.
4. **Trial.** Circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom.
5. **Trial: Evidence.** Conjecture, speculation, or choice of possibilities is not proof. There must be something more which

would lead a reasoning mind to one conclusion rather than another.

6. **Trial.** In every jury trial, before the case is submitted there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Appeal from the district court for Knox County: GEORGE W. DITTRICK, Judge. Reversed and dismissed.

Jewell & Otte, for appellant.

Roscoe L. Rice and Frank Roubicek, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

SPENCER, J.

This is an action to recover under the theft provision of an insurance policy issued by the defendant. Defendant moved for a directed verdict after the plaintiff had adduced his evidence. When the motion was overruled, defendant rested and again moved for a directed verdict. This motion was also overruled. The jury returned a verdict for the plaintiff. Defendant filed a motion for judgment notwithstanding the verdict, and after it was overruled perfected an appeal to this court.

Plaintiff purchased an insurance policy for ranchers and farmers issued by the defendant. It is a limited policy. The provisions material to this risk are as follows: "(f) Theft and overturn. This insurance is extended to include direct loss by theft (but excluding escape, mysterious disappearance, inventory shortages, wrongful conversion and embezzlement), and overturn. In the event of loss by theft, the insured shall give immediate notice to the nearest law enforcement officer, but shall not, except at his own cost, offer to pay any reward for recovery."

Plaintiff operates a 480-acre farm in Knox County, consisting of 180 acres of farm land and 300 acres of

rough land. There are two creeks across the farm which join the Verdigre Creek a mile from the plaintiff's farm. During April 1965, plaintiff owned 60 hogs which he kept during the night in a hog-tight pen on the premises. During the day he allowed the hogs to range out in an adjoining cornfield which was not hog tight.

On Sunday evening, April 25, 1965, when plaintiff and his family returned to the farm, he went to pen up the hogs and noticed that several seemed to be missing, but did not count them. The next morning, he determined that 24 hogs were missing. During the following week plaintiff, when he could spare the time, hunted for the hogs by looking around the farm, by walking up and down the creeks, and by visiting some of the neighbors. He found some tracks by the creek where the hogs had rooted, but was unable to follow them.

The Sunday after the disappearance of the hogs, two of them returned. The next day, May 3, 1965, he attempted to follow the tracks made by the returned hogs. While doing so, he heard a tractor on the other side of the hill. The operator, a neighbor, Vince Cihlar, told him that some hogs had come to his farm and, believing they belonged to Harold Effle, his neighbor, he had called Effle to come and get them. Effle, after starting home with the hogs, determined they were not his and abandoned them at a bridge near his farm. Effle lives about a mile across the creek from the plaintiff's place. The plaintiff did not report the disappearance of the hogs to the sheriff until May 4, nor to the insurance company until May 5.

Plaintiff could not find any hog tracks near the bridge where the hogs were last seen. He did not look, however, until several days after the hogs disappeared. Plaintiff was also unable to find any evidence of vehicle tracks in the vicinity of the bridge or on his premises where hogs could have been loaded.

The policy in question provides for immediate notice of any loss to the nearest law enforcement officer as

well as immediate written notice to the company. The answer of the defendant denied liability because any loss sustained by the plaintiff was not within the coverage of the policy, and for the further reasons that the plaintiff did not submit a proof of loss within the period provided by the policy and did not immediately report the alleged loss to the nearest law enforcement officer.

For purposes of a decision herein, the only question we need to consider is the sufficiency of the evidence to present a jury question.

In popular usage, the word "theft" is another name for "larceny." As a general rule, however, the term as used in an insurance policy is not necessarily synonymous with larceny, but may have a much broader and more inclusive meaning. It could cover pilferage, swindling, embezzlement, conversion, and other unlawful appropriations as well as larceny. Here, however, it is apparent that the term is used in a much more restricted sense than is usually the case. While it is not necessary to arrive at a precise definition herein, it is evident "theft" must be construed to mean something other than escape, mysterious disappearance, inventory shortage, wrongful conversion, or embezzlement, because these are specific exclusions in the policy.

"Escape" is defined in Black's Law Dictionary (4th Ed.), p. 639, as a flight from custody. In Webster's New International Dictionary (2d Ed.), Unabridged, p. 871, the word "escape" is defined as: "To get away * * *; to break away, get free, or get clear * * *." As used in this policy pertaining to livestock, "escape" must be construed to mean straying from or leaving the place of confinement.

"Mysterious disappearance," under the terms of a theft policy, has been defined as disappearance under unknown, puzzling, and baffling circumstances which arouse wonder, curiousity, or speculation, or under circumstances which are difficult or hard to explain. Conlin v. Dakota Fire Ins. Co. (N. D.), 126 N. W. 2d 421.

The term "inventory shortage" involves an unexplained inventory shrinkage, and need not be considered further herein.

We have defined "conversion" as any unauthorized act which deprives the owner of his property. Mapledge Corp. v. Coker, 167 Neb. 420, 93 N. W. 2d 369. We assume herein, however, that "unlawful conversion" as used in the policy presupposes the converting of a lawful possession into an unlawful one.

"Embezzlement" is a statutory crime and is defined by section 28-538, R. R. S. 1943. Substantially, it is the appropriation of property to his own use by someone to whom it has been entrusted.

Under the evidence adduced by plaintiff, we must conclude that the hogs originally strayed, or, within the policy, escaped from the cornfield. They reached the Cihlar farm, which is some undetermined distance across the hill from the plaintiff's farm. They were then driven from the Cihlar farm by Effle and abandoned near his premises when he determined that they were not his hogs. Except for two of them, from the point of abandonment they mysteriously disappear. Neither Cihlar nor Effle was called as a witness. The sheriff testified his investigation disclosed that Effle abandoned the hogs at the bridge near his premises. On cross-examination he testified that he inspected the Effle hogs and that none of them answered the description of the missing hogs.

On this state of the record, did the plaintiff adduce sufficient evidence to warrant the submission of the case to the jury? The thrust of the plaintiff's argument is that because Effle was the person who had last seen the hogs, the jury could draw an inference that he is the person responsible for the theft. Effle was not called as a witness. His statement is in the record as a part of the investigation of the sheriff who was called by the plaintiff. The sheriff testified that he checked the Effle farm and the hogs were not there. He also checked

the sales barns and could find no evidence that the missing hogs had been sold. He further testified on cross-examination that he could find no evidence that the hogs were stolen. To indulge the presumption on this record that because the hogs cannot be traced from the bridge, a theft within the terms of the policy must have resulted, is to grant relief solely on the basis of speculation and conjecture.

It is a common experience in this state for stray livestock to be confined until the owner can be located. Two of the hogs returned a week after they "escaped." It is entirely possible the remainder continued to stray until someone penned them up waiting for the owner to claim them. This would not be an unlawful act. They could later have been wrongfully converted. The hogs were mixed breeds and had no distinguishing marks. After a short period of time, it is doubtful if even the owner could have recognized them. The mere fact plaintiff did not find the hogs does not prove they were stolen within the terms of the policy. The record herein does not indicate a particularly exhaustive search to discover the whereabouts of the missing hogs. The plaintiff did search up and down the creek, but no distances are given. He did visit with six or seven neighbors. The hogs had been gone for 9 days before the loss was reported to the sheriff.

Plaintiff may establish his case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 142 N. W. 2d 309. Or, to phrase it differently, the evidence must be sufficient to make the theory of causation reasonably probable and not merely possible. Conjecture, speculation, or choice of possibilities is not proof. There must be

something more which will lead a reasoning mind to one conclusion rather than another. In the instant case, the most plausible conclusion brings the loss of the hogs herein within the exclusions of the policy.

In every jury trial, before the case is submitted there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

The motion for a directed verdict at the conclusion of the plaintiff's case raised the question as to the sufficiency of the evidence and should have been sustained.

For the reasons given, the judgment herein is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

CLAIR COOMES, APPELLANT, V. ROLAND DRINKWALTER ET AL., APPELLEES.

149 N. W. 2d 60

Filed March 3, 1967. No. 36438.

1. **Livestock: Statutes.** Livestock brand statutes were enacted for the protection of the owners of the brands and the brand upon cattle is prima facie evidence of title.
2. **Replevin: Livestock.** In a replevin action involving branded livestock, where the plaintiff's recorded brand is on an animal and is older than defendant's brand on the animal, it is prima facie evidence of ownership in the older brand, and places the burden on the defendant to establish his right to put his brand upon the animal.
3. **Larceny.** Generally, a thief can acquire no title to stolen property, nor can title to personal property be acquired through another's larceny or theft.
4. **Trial: Appeal and Error.** A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial.

Appeal from the district court for Dawes County: ROBERT R. MORAN, Judge. Reversed and remanded with directions.

Everett A. Anderson and Michael V. Smith, for appellant.

Charles A. Fisher and Charles F. Fisher, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

MCCOWN, J.

This is a replevin action for the recovery of possession of cattle. It involves the ownership and right of possession as affected by statutes dealing with branded livestock. After 6 hours of deliberation, 10 members of the jury returned a verdict for the defendants and the plaintiff has appealed.

Registered cattle brands of three states are involved. The ranch of the plaintiff, Clair Coomes, was located near Manderson, South Dakota. With his brother, he was the owner of the registered South Dakota brand reverse DC located on the right hip. In July 1962, 19 yearling heifers and 8 cows with unbranded calves disappeared from the plaintiff's herd. The heifers and cows all bore the reverse DC brand on the right hip. All of his animals were ear marked by splitting the right ear. All of his replacement heifer calves were year branded on the right shoulder with arabic numbers which represent the last digit of the year when the animal is branded. All of his 1961 replacement heifers were vaccinated for brucellosis and were branded with a V pointing toward the eye on the right jaw. All replacement heifers become a part of the general cow herd after they reach 2 years of age. The plaintiff never sells any cows unless they become crippled or too old to produce.

Jack Lewis operates a ranch 4 miles north of the plaintiff's ranch, also in South Dakota. Mr. Lewis owns and uses the lazy JL connected brand on the left ribs and

this brand is recorded in Wyoming. His replacement heifers are age branded on the left shoulder and were marked with a split left ear. His heifers are vaccinated for Bangs disease and a tattoo is put in the right ear in the form of a shield to show that they have been vaccinated. In front of the shield is a number representing the quarter of the year in which the animal was vaccinated, and to the right of the shield is a number which represents the last digit of the year of vaccination. Mr. Lewis does not sell cows unless they are old or crippled or no longer good for breeding. In January 1963, some cows branded as described disappeared from the Lewis ranch.

On October 15, 1964, the plaintiff, Clair Coomes, accompanied by the sheriff of Dawes County, Nebraska, an investigator for the Nebraska Brand Committee, and several other individuals, went to a pasture northeast of Crawford, Nebraska. The pasture was that of Mr. McGinnis, and the cattle were being pastured there by the defendant, Roland Drinkwalter. The sheriff took nine cows and accompanying calves to the Chadron Sale Barn at Chadron, Nebraska, where they were inspected and unloaded into a padlocked pen. The following morning, the plaintiff and others went to the pens in Chadron and examined the nine cows more closely. Each cow was roped, tied, the brand area sheared off, and photographs taken. Mr. James Long, an investigator for the Nebraska Brand Committee and a deputy state sheriff, testified that eight of the nine cows had a reverse DC brand on the right hip and also had a reverse DC over a quarter circle on the right hip. Five of these cows had a quarter circle over a reverse RD on the left ribs. All eight were year branded, three with the figure "1" on the right shoulder, one with the figure "0" on the right shoulder, and four with the figure "9" on the right shoulder. Each of these eight had its right ear cropped off. "A couple" of these had a piece of a V in the end of the ear that was cropped off.

The three of these eight that had the year brand "1" on the right shoulder also had an inverted V on the right jaw. The ninth cow bore a lazy JL brand on the left ribs, and a bar over HH over a bar brand on the left ribs. It also had the year brand "9" on its left shoulder, and both ears were cropped off. It had the remainder of a tattoo in the cropped right ear showing half of a shield and the figure "0".

Mr. Long testified that he had had 12 years experience as an investigator for the Nebraska Brand Committee and that his duties required him to check and inspect brands about every day, two or three times a week at least. He testified that he was able to tell the relative age of two or more brands on a single animal from the amount of scar tissue in the brand and the depth of the distance it projects from the top of the hide and also from the color of it—what is referred to as "horned out" condition of the brand. The brand grows with the animal from the time it is put on and develops more scar tissue as the animal grows older. Mr. Long specifically testified that on the eight cows above referred to, the reverse DC quarter circle was superimposed over the reverse DC brand on the right hip, and that the bar over HH over bar brand on the ninth cow was superimposed over the lazy JL brand on the left ribs.

The reverse DC over a quarter circle brand on the right hip is owned by defendant Kenneth Drinkwalter, the son of Roland Drinkwalter. The quarter circle over a reverse RD brand on the left shoulder, ribs, and hip is owned by the defendant Roland Drinkwalter, and the bar over HH over a bar on the left ribs is owned by the defendant Jean Drinkwalter, a sister of Roland Drinkwalter. These three brands were all recorded in Nebraska. The reverse DC South Dakota brand owned by the plaintiff and his brother had been in the family since the 1920's. The reverse DC over a quarter circle

was recorded for the minor defendant Kenneth Drinkwalter in Nebraska on August 9, 1961.

Neither the plaintiff nor Mr. Lewis had ever sold or given any cattle of any kind to any of the defendants. On March 1, 1965, Jack Lewis assigned his claim to the lazy JL cow above described to the plaintiff, and this action was filed on March 24, 1965, seeking the recovery of the nine cows and their calves.

The defendants' evidence was that 15 animals had been purchased from a Mr. McClanahan in Scottsbluff in May 1962; that they were unbranded except for year marks on the shoulder and a V on the jaw. There was testimony that some animals had been raised. There was also testimony that some animals had been branded with a reverse DC quarter circle; that the brands on the animals branded by them were not worked over; or that the witnesses had never seen a reverse DC on any of the animals testified about prior to the defendants' branding. The animals described by the defendants' witnesses had been taken to Mr. McGinnis' pasture. As to the one cow with the lazy JL brand, Jesse Drinkwalter testified that it was purchased from Oris Glaze and sold to his sister, Jean Drinkwalter, and that they branded it in the winter with her brand and along in the spring, when it shed off, it bore another brand. Oris Glaze had died prior to the trial.

The plaintiff's principal assignments of error are that the court erred in refusing to instruct the jury that if the plaintiff established that the animals bore his brand at the time the action was commenced, this fact was prima facie evidence of ownership of the animals by the plaintiff and the burden of proof shifted to the defendants to rebut the presumption of ownership, and that under such circumstances, the court should not have instructed the jury that the plaintiff in this action must recover, if at all, upon the strength of his own title rather than upon the weakness of the defendants' title. Error is also charged in failing to instruct the

jury that it is unlawful for any person to knowingly obliterate or deface a brand or mark upon any animal of another.

The plaintiff's pleading and proof were specifically that plaintiff's brand or that of Jack Lewis had been first placed on the specific cows involved here, and that the defendants' brands had been superimposed over them. Taken in conjunction with the Nebraska brand laws, the ownership and registration of the brands and the testimony of the investigator for the Nebraska Brand Committee, which was never directly refuted, established plaintiff's prima facie ownership of the specific cows involved. While it is true generally that in replevin, the plaintiff must recover, if at all, upon the strength of his own title rather than upon the weakness of the defendant's title, the brand statutes provide specific rules for establishing ownership of branded livestock, as well as rules of evidence and the burden of proof. Such statutes were enacted for the protection of the owners of the brands, and the brand upon cattle is prima facie evidence of title. See, Bendfeldt v. Lewis, 149 Neb. 107, 30 N. W. 2d 293; § 54-109, R. R. S. 1943.

While the brand statutes do not go so far as statutes dealing with transfer of title to motor vehicles in the sense of making title certificates the sole method of establishing ownership, their import is similar in many respects. The branding statutes, for example, prohibit any person except a bonded livestock commission firm from selling or offering for sale or trade any livestock on which such persons do not have their recorded brand or for which they have neither a bill of sale nor power of attorney from the owner of the livestock, or other substantial evidence of ownership. The bill of sale must state a buyer's name and address, the date of transfer, the guarantee of title, the number of cattle transferred, the sex, the brand or brands, the location of the brand or brands, or a statement to the effect that the animal is unbranded. See § 54-118, R. S. Supp., 1965.

In the case of a shipper or seller, if any animal inspected by the Nebraska Brand Committee is unbranded or bears a recorded brand or brands other than those of the shipper or seller, then the shipper or seller may be required to establish his ownership of such animal, and if he fails to do so within 60 days, the animal shall be considered to be an estray and the sale price paid to the Nebraska Brand Committee. See, §§ 54-148, 54-149, R. S. Supp., 1965.

We hold that in a replevin action involving branded livestock, where the plaintiff's recorded brand is on an animal and is older than defendant's brand on the animal, it is prima facie evidence of ownership in the older brand, and places the burden on the defendant to establish his right to put his brand upon the animal. State v. Moss, 95 Or. 616, 188 P. 702.

The rule stated as to automobile title certificates in the case of Allstate Ins. Co. v. Enzolera, 164 Neb. 38, 81 N. W. 2d 588, is also applicable here. "Generally, a thief can acquire no title to stolen property, nor can title to personal property be acquired through another's larceny or theft."

Plaintiff also requested that the court instruct the jury as to the provisions of section 54-114, R. R. S. 1943, making it unlawful for any person to willfully and knowingly brand the animals of another or deface or obliterate any brand or mark upon any animals of another. This instruction was refused and no instruction as to this issue given. The plaintiff had specifically pleaded the issue and had introduced evidence to establish it. It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial. See Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538.

For the reasons stated, there was prejudicial error, and

the judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RALPH GEBHART ET AL., APPELLEES, V. TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., APPELLANT.

149 N. W. 2d 41

Filed March 3, 1967. No. 36479.

1. **Dismissal and Nonsuit.** A plaintiff may dismiss his action as a matter of right at any time before final submission of the case.
2. ———. In the absence of a cross-petition filed by another party, a dismissal of plaintiff's cause of action dismisses the entire cause.
3. **Appeal and Error.** A cross-appeal is, in essence, simply an appeal perfected by a second party to the action subsequent to a prior appeal by an adverse party.
4. ———. A party taking a cross-appeal must comply with all the statutory requirements for an appeal and must file an appeal bond as contemplated by section 76-716, R. R. S. 1943.

Appeal from the district court for Perkins County: VICTOR WESTERMARK, Judge. Affirmed.

Frederick E. Wanek, for appellant.

Herbert L. Jackman and William S. Padley, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

NEWTON, J.

This is an eminent domain action.

Defendant, Tri-State Generation and Transmission Association, Inc., brought an action in the county court of Perkins County, Nebraska, to acquire a right-of-way for an electric transmission line over and across the farm of plaintiffs. Appraisers were duly appointed and

qualified and, after hearing, entered an award in favor of plaintiffs. Plaintiffs appealed to the district court from the award made by the appraisers, gave bond, and caused a transcript to be filed in the district court. Thereafter, the defendant gave notice of appeal to the district court and caused a transcript to be filed therein, but did not file a bond on appeal. Plaintiffs' petition and defendant's answer were thereupon filed in the district court. Thereafter, on motion of plaintiffs, plaintiffs' appeal was dismissed by the court. The court then dismissed the appeal of defendant.

Defendant appeals to this court and assigns as error first, the dismissal of plaintiffs' appeal and second, the dismissal of defendant's cross-appeal.

Regarding the voluntary dismissal by plaintiffs of their appeal, it is well settled that a plaintiff may enter a dismissal as a matter of right at any time before final submission of the case. Giesler v. City of Omaha, 175 Neb. 706, 123 N. W. 2d 650; § 25-601, R. R. S. 1943.

Defendant contends that its cross-appeal could not be dismissed without its consent. Plaintiffs, in reply, state that an appeal was not completed by defendant because of its failure to post appeal bond as provided by section 76-716, R. R. S. 1943. It will be noted that although pleadings had been filed following the appeal to the district court, defendant filed an answer, but nothing in the nature of a cross-petition. Ordinarily, when an action is pending in the district court a dismissal of the petition, or of plaintiffs' action, dismisses the entire cause except where something in the nature of a set-off or counterclaim has been presented by defendant as contemplated in section 25-603, R. R. S. 1943. No such pleading appears in this cause. It is apparent that dismissal of plaintiffs' petition on appeal resulted in a dismissal of the entire cause unless a valid cross-appeal had been perfected by defendant. It is, therefore, necessary to examine the nature of a so-called cross-appeal. What is a cross-appeal? Essentially it is simply an

appeal perfected by a second party to the action subsequent to a prior appeal by an adverse party. This being true, it would not appear that there was anything in the nature of a cross-appeal which would dispense with the formalities required on any given appeal. Section 76-716, R. R. S. 1943, requires: "The party appealing shall also, at the time of filing of notice of appeal, enter into an undertaking, * * *." Defendant, as a cross-appellant, was simply a "party appealing" within the purview of this statute and was not exempt from complying with its provisions. Had it so complied, it would have completed a separate appeal which would not have been subject to dismissal on dismissal of the plaintiffs' appeal. It is true that when the first appeal was completed, the court acquired jurisdiction of the cause and of the parties concerned, but defendant, not having filed a second appeal or anything in the nature of a cross-petition, jurisdiction of the entire cause was lost when the court sustained plaintiffs' voluntary motion for dismissal of their appeal and the court properly entered a further order of dismissal with reference to defendant's alleged cross-appeal.

The judgment of the district court is affirmed.

AFFIRMED.

CHARLES E. JACKMAN ET AL., APPELLEES, V. TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., APPELLANT.

149 N. W. 2d 43

Filed March 3, 1967. No. 36480.

Appeal and Error. One of several plaintiffs, having a separat and distinct cause of action from his coplaintiffs, may prosecute an appeal from the county court to the district court without joining his coplaintiffs.

Appeal from the district court for Perkins County: VICTOR WESTERMARK, Judge. Affirmed.

Frederick E. Wanek, for appellant.

Herbert L. Jackman and William S. Padley, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

NEWTON, J.

This is an eminent domain action.

Defendant, Tri-State Generation and Transmission Association, Inc., brought action in the county court of Perkins County, Nebraska, to acquire a right-of-way for an electric transmission line over and across the farm of plaintiffs Jackman. Plaintiff Martin Mahnken was the tenant in possession of the farm. Appraisers were duly appointed and qualified and, after hearing, entered an award in favor of plaintiffs. The plaintiffs Jackman gave notice of appeal to the district court from the award made by the appraisers, filed an appeal bond, and caused a transcript to be filed in the district court. Thereafter, the defendant gave notice of appeal to the district court and caused a transcript to be filed therein, but did not file a bond on appeal. The plaintiff Martin Mahnken did not appeal. The plaintiffs Jackman filed their petition in the district court and defendant filed an answer thereto. Subsequently, the plaintiff Martin Mahnken moved for a dismissal of the defendant's cross-appeal as to him, which motion was sustained by the court.

This is a companion case to case No. 36479, Gebhart v. Tri-State Generation & Transmission Assn., Inc., *ante* p. 457, 149 N. W. 2d 41, and by stipulation, the two cases were consolidated for the purpose of filing briefs and submitting arguments in this court. The opinion rendered in the companion case is determinative of this action also, with the exception of one further proposition. Did the appeal of the plaintiffs Jackman bring up the cause to the district court as regards

the plaintiff Martin Mahnken? The record in this action reveals that separate awards were made by the appraisers to the owners of the land and to the tenant Martin Mahnken, who found the award satisfactory and did not appeal therefrom. It is apparent that the interest of the plaintiffs Jackman and of the plaintiff Mahnken are not inseparably connected. Where the parties have separate interests, one may appeal without joining the others, the case under such circumstances not being brought up on appeal as to such other parties. Polk v. Covell, 43 Neb. 884, 62 N. W. 240; Claflin v. American Nat. Bank of Omaha, 46 Neb. 884, 65 N. W. 1056.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

JANET CLARK, APPELLANT, V. LARRY SMITH, APPELLEE.
149 N. W. 2d 425

Filed March 10, 1967. No. 36306.

1. **Automobiles: Trial.** A party is not entitled to an instruction concerning the violation of a statutory rule relating to the lighting of motor vehicles unless the record discloses a causal connection between such alleged violation and the accident or injury for which recovery is sought.
2. **Trial.** Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded. However, contradictory statements of nonparty witnesses under circumstances disclosed in this case are not governed by this rule and such contradictions may be submitted to the jury as affecting the weight of the evidence and the credibility of the witnesses.
3. **Automobiles: Evidence.** Where the testimony of a sole or primary witness of necessity involves questions of the speed of vehicles involved in a collision, he may be required on cross-examination to answer direct inquiries as to speed even though

no such inquiry is made in the course of his direct examination.

4. **Automobiles: Trial.** Where the right-of-way of vehicles upon a highway is an issue, the court must instruct as to the duties of drivers thereof to remain on the right-hand side of the road if competent evidence places the vehicles in the position of proceeding toward each other in opposite directions.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded.

Gross, Welch, Vinardi, Kauffman & Schatz, for appellant.

Matthews, Kelley & Cannon, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and BOYLES, District Judge.

BOYLES, District Judge.

Automobiles operated by the plaintiff and the defendant collided at the intersection of Fifty-Sixth Street and Center Street in the city of Omaha, Douglas County, Nebraska. Plaintiff's vehicle had halted at a stop sign on the north side of Center Street and was proceeding through the intersection to make a left turn to the east. Defendant was driving west on Center Street, which was the favored highway. The collision occurred in the area of the centerline of Center Street and near the east side of the intersection. Plaintiff prosecutes this action for her personal injuries and property damage. Defendant counterclaims. The defendant recovered a verdict on his counterclaim.

The plaintiff makes 9 assignments of error, some of which are here joined for the purposes of discussion. Assignments of error 1 through 3 relate to the sufficiency of the evidence. The plaintiff strongly contends that where the evidence of liability adduced by the defendant on his cross-petition depends entirely on the testimony of one witness and that witness is impeached as to vital matters by the production of prior contradictory statements, some of which were made under oath and elicited

by defendant's own attorney, the testimony of such witness is entirely discredited and there remains nothing to submit to the jury. We hold that the trial court did not err in this respect. In Sacca v. Marshall, 180 Neb. 855, 146 N. W. 2d 375, this court recently determined that where such contradictory statements are not made by a party-litigant, the jury has a right to consider the facts and circumstances as bearing on the weight of the evidence and the credibility of the witness.

Assignments of error 4 and 5 relate to the refusal of the trial court to submit to the jury the question of whether the defendant should have been operating his vehicle with lighted headlights, under the terms of section 39-778, R. R. S. 1943, requiring such lighting "at any other time when there is not sufficient light to render clearly discernible persons or vehicles upon the highway at a distance of five hundred feet ahead." The record discloses the approach of sunset, that there was some darkness, and that some vehicles were lighted. However, it also discloses that the plaintiff could see the cars on the road and that one of the plaintiff's witnesses observed defendant's car at a distance of 2 blocks. The record nowhere directly shows any lack of visibility at a distance of 500 feet. Moreover, the record is silent as to any causal connection between the failure of defendant to use his lights and the collision. We hold that the trial court did not err in this regard. See Becker v. Hasebroock, 157 Neb. 353, 59 N. W. 2d 560.

Plaintiff further argues that she was prejudiced in the giving of instruction No. 17. The court here properly instructed the jury as to statutes and ordinances relating to the speed of motor vehicles, having previously set out the applicable statutes and ordinances relating to other rules of the road. Instruction No. 17 then continues in customary form: "You are further instructed that if you find from the evidence that either the plaintiff or the defendant violated any of the provisions of the above traffic laws or ordinances, or any

other traffic laws or ordinances set out in these Instructions, the violation thereof would not be in and of itself negligence as a matter of law or negligence per se on the part of the violator but would be evidence of negligence to be considered by you together with all the other facts and circumstances in evidence in the case to determine whether or not such violator was guilty of negligence." The plaintiff contends that no issue was raised as to an unlawful speed of her vehicle and that this instruction should not have been given. However, in view of our established rule that instructions must be construed as a whole, and in view of instruction No. 30 directing the jury to so construe the instructions in this particular case, and in view of the reference in instruction No. 17 to "* * * any other traffic laws or ordinances set out in these Instructions * * *," we hold that no prejudicial error was committed by the reference to the plaintiff in this instruction.

Assignments of error 6 and 7 relate to the exclusion of evidence concerning the speed of the defendant's vehicle. The matter of defendant's speed was raised by the pleadings of both parties and was vital both as to the broad allegations of negligence and as to the issue of right-of-way.

Plaintiff called the witness Wiebusch, who qualified as to experience, opportunity to observe, and indicated that she had an opinion as to defendant's speed. During interrogation by defendant's counsel, the witness indicated she could not accurately judge the speed of vehicles under the conditions stated, and the court refused her opinion. Ordinarily, the credibility of such testimony is for the jury, but, the record being as it is, we cannot say that the trial court violated its discretion in refusing this testimony.

A different situation prevails as to the cross-examination of defendant's witness Morse. He was defendant's only witness on the general issue of liability. He testified in detail as to his observation of the collision

and the circumstances both before and after the impact. He testified that the noise from the motor of defendant's car caused him to pull further to the right side of the street. He testified as to his own speed at various relevant times. He further testified that defendant's car passed him, and gave estimates of distances relating to the position of defendant's vehicle at the time of and after such passing. We think this testimony directly involved the speed of defendant's vehicle and that he could be cross-examined thereon as a matter of right. Even if this were not true, we believe that the rule stated in Zimmerman v. Lindblad, 154 Neb. 453, 48 N. W. 2d 415, is applicable: "The general rule is that a party has no right to cross-examine a witness except as to facts and circumstances connected with matters testified about on his direct examination. * * * However within the meaning of this rule cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness. * * * Also where testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right. * * * Again, anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination."

Attention is also called to the rule expressed in Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381: "On cross-examination inquiry was made concerning the speed of the car approaching from the east. The court sustained an objection to the question on the ground that it was improper cross-examination, it not having been inquired about on direct examination. We think the inquiry was entirely proper. Plaintiff had testified that the car was in motion. Certainly she could be interro-

gated on cross-examination as to the speed of the car, it being an important fact under the issues. We think the trial court's ruling was too restrictive and that defendants' counsel were entitled, after plaintiff testified that she had seen the other car entering and proceeding across the intersection in which the collision occurred, to inquire on cross-examination into its speed, course of travel or any other fact bearing upon the cause of the accident." We hold that the exclusion of this testimony was prejudicial and is ground for a new trial.

Assignment of error 9 is based on the failure of the court to instruct that the defendant had a duty to remain to the right of the center of the street. The court instructed concerning the statutory rules governing right-of-way in protected intersections, but did not instruct as to duties of the parties if plaintiff had in fact completed a turn to the left and was proceeding east on the south side of the centerline of Center Street. The issue was raised by the pleading of failure to yield right-of-way, contained in defendant's cross-petition, and denied by the plaintiff. There is competent evidence in the record to support plaintiff's contention, particularly the testimony in relation to the point of impact and to the position of the vehicles immediately after the collision. We have many times decided that a trial court must submit to the jury, with proper instructions, any material issue pleaded which finds support in the evidence. The instruction concerning right-of-way as given is incomplete in this respect, and this omission is prejudicial. Brown v. Kaar, 178 Neb. 524, 134 N. W. 2d 60.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMAS ZAWADA, APPELLEE, V. MICHAEL BRIAN ANDERSON ET AL., APPELLANTS.

149 N. W. 2d 329

Filed March 10, 1967. No. 36375.

1. **Automobiles: Negligence.** The failure of a pedestrian with the right-of-way to see an approaching car within the liimt of danger or to correctly judge its speed does not ordinarily constitute contributory negligence as a matter of law. It is no more than evidence from which a jury may find contributory negligence.
2. ———: ———. A pedestrian crossing at a regular crosswalk with the right-of-way is not, as a matter of law, required to keep a continuous lookout for an approaching vehicle.
3. ———: ———. A pedestrian crossing at a regular crosswalk and having the right-of-way has a right to assume that his right-of-way will be respected until he has notice or knowledge to the contrary.
4. **Trial: Appeal and Error.** Instructions should be considered together and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon.
5. **Trial: Damages.** If a defendant does not tender an instruction proper to the evidence for a present worth recovery of damages, it is not error for the trial court to fail to instruct thereon.
6. **Pleading: Appeal and Error.** Amendments to the pleadings during or after trial may be permitted by the court within its sound discretion and error may not be predicated thereon in the absence of a showing of prejudice.
7. **Trial: Evidence.** The introduction in evidence of a map, chart, or diagram illustrating the scene of a transaction and the relative location of objects rests in the sound discretion of the court, and if they are reasonably accurate and correct are admissible in evidence.
8. **Damages: Appeal and Error.** The amount of damages for future disability and pain and suffering is not based on any legal rule or formula for measuring them and rests largely in the sound discretion of the jury. It will not be set aside unless so clearly exorbitant as to indicate passion and prejudice or disregard of the evidence or controlling rules of law by the jury.
9. **Damages.** There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. It is a matter left largely to the discretion of the jury which saw the witnesses and heard the evidence.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Rickerson & Homan, for appellants.

Warren C. Schrempp, J. William Gallup, and Levin & Gitnick, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and WEAVER, District Judge.

WHITE, C. J.

This is a car-pedestrian accident occurring at 6:30 p.m., August 7, 1963, in the east crosswalk of the intersection of St. Mary's Avenue and Park Avenue in Omaha, Nebraska. Plaintiff recovered a jury verdict and judgment of $18,867. Defendants appeal.

Defendants' first contention is that the plaintiff was guilty of contributory negligence as a matter of law. In resolving this question plaintiff is entitled to have all conflicts in the evidence and reasonable inferences resolved in his favor. St. Mary's Avenue, 50 feet wide, is a westbound, four-lane, one-way street with a pedestrian crosswalk on the east side where it intersects Park Avenue, and is controlled by automatic signals. Plaintiff was walking south on the east side of Park Avenue, came to the intersection, entered the crosswalk on the green light, and observed that there were two cars stopped to his left in the two northernmost traffic lanes on St. Mary's Avenue. He proceeded in the crosswalk across the intersection. Halfway across he observed the green light still in his favor. Another car, driven by the witness Mino St. Lucas, was approaching in the third lane. St. Lucas saw the plaintiff about two car lengths from the crosswalk, and stopped his car about a car length away to permit him to cross. The defendant, Michael B. Anderson, was approaching in the fourth or southernmost lane of traffic immediately to the left and south of the Mino St. Lucas car. Plaintiff, after observing the green light halfway across the intersection, proceeded on across, looked to the left again and saw defendant Michael B. Anderson's car when it was about

15 or 20 feet from him. He was between 4 and 10 feet from the south curb when struck on the left hip by the left front end of defendant's vehicle. He was thrown 26 feet to the southwest by the impact. There is testimony to the effect that the plaintiff quickened his pace or ran a few steps just before the impact occurred. Plaintiff's testimony is to the effect that after seeing defendants' vehicle he continued walking. Defendant driver never saw plaintiff until the impact, never slackened his speed or applied his brakes prior to impact, and traveled 40 feet across the intersection before stopping. His speed was 20 to 25 miles per hour, and he testified he had the green light from about half a block back.

Defendants argue that plaintiff was guilty of contributory negligence as a matter of law in moving from a place of safety into the path of danger of defendant's vehicle. We do not agree. In a literal sense, we suppose any pedestrian involved in a collision with a vehicle at an intersection crosswalk has moved from a place of safety into the path of danger at some point during the crossing. The more precise question is whether, as a matter of law, plaintiff was negligent in not seeing defendants' vehicle sooner than he did, or not taking steps by stopping or otherwise, to avoid the collision. He first saw defendants' vehicle when it was 15 to 20 feet to the east of him. The applicable ordinances of the City of Omaha gave plaintiff the right-of-way on the crosswalk, this right-of-way continued until plaintiff had finished his crossing, and the ordinances required defendant driver to yield the right-of-way and not to pass any car stopped for the passage of pedestrians. In this case there were at least two cars stopped and one slowing down or stopped for the passage of the plaintiff who was in plain sight on the crosswalk. Plaintiff entered the crosswalk on the green light, looked to the east, and saw two cars stopped for his passage. He had a right to assume that his right-of-way would be re-

spected and that all cars approaching in the two southernmost lanes would not pass the stopped cars and interfere with his safe passage over the crosswalk. At the center of the intersection he still had the green light. He was struck when almost across the intersection. The question of whether he should have seen defendants' vehicle sooner and stopped or otherwise avoided the accident is clearly a matter for the jury's consideration and not for this court to determine as a matter of law. To hold otherwise, in effect, would be to hold that a plaintiff pedestrian, having entered a crosswalk and having the right-of-way, continues to cross at his peril. Plaintiff cannot be charged with negligence, as a matter of law, for a failure to waive his right-of-way because of a failure to see defendant in time to avoid the accident, especially when he had a right to assume that defendant would respect his right-of-way and stop, if necessary, to permit his passage. In the case of Beck v. Trustin, 177 Neb. 788, 131 N. W. 2d 425, similar contentions were made as to plaintiff pedestrian in a crosswalk. Therein we said: "As pointed out in Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556, before a verdict can be directed against a motorist for failing to see an approaching vehicle at a nonprotected intersection, the position of the approaching vehicle must be undisputedly located in a favored position. Certainly, a pedestrian with a right-of-way is in a much stronger position, and if his right-of-way is to be protected, we cannot permit the failure to see an approaching car or a misjudgment as to its speed to be the sole criteria. *The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law. It is no more than evidence from which a jury may find contributory negligence.*" (Emphasis supplied.)

Plaintiff was not required as a matter of law to keep a continuous lookout for the defendant driver as he

crossed the intersection on the crosswalk. He had a right to assume defendant driver would respect his right-of-way until he had notice to the contrary. The issue of his contributory negligence was clearly for the jury's determination. There is no merit to defendants' contention.

The trial court, in instruction No. 3 relating to the statement of the issues, set out three alleged particular acts of contributory negligence on the part of the plaintiff. Defendants contend that the trial court erred in not specifically informing the jury that it could find the plaintiff guilty of contributory negligence if it found the defendants had proven one or more of these allegations. But the court did set out three distinct and separate alleged acts of negligence. And we no not feel the jury was misled into believing that all three acts had to be proved to constitute contributory negligence. Implicit in the separate statement of acts of negligence was the inference that proof of any one of them could constitute negligence. Further, in instruction No. 5 in defining contributory negligence the court stated, "By this is meant *any* negligence of plaintiff directly and proximately contributing to cause the accident." (Emphasis supplied.) In defining negligence the court stated, "The doing of some act * * *" or "the failure to do some act * * *." In the light of the fact that the court set out three particular and separate acts of contributory negligence, we fail to see any error in the instruction. Instructions should be considered together and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon. Bunselmeyer v. Hill, 179 Neb. 140, 137 N. W. 2d 354; O'Brien v. Anderson, 177 Neb. 635, 130 N. W. 2d 560.

Defendants complain that the trial court permitted the plaintiff, during the trial, to amend his petition to allege damages for future pain and suffering. Under the statute, section 25-852, R. R. S. 1943, and our cases, this matter rests in the sound discretion of the trial court and

error cannot be predicated thereon in the absence of an abuse of discretion. See Sleezer v. Lang, 170 Neb. 239, 102 N. W. 2d 435. Defendants fail to point out wherein they were prejudiced. They introduced medical testimony by a doctor who examined plaintiff prior to trial and who testified extensively as to plaintiff's injuries and future disabilities. They made no motion for a continuance. No abuse of discretion by the trial judge has been shown. There is no merit to this contention.

Defendants complain that the trial court instructed on the issue of aggravation of a preexisting injury or condition. They do not complain of the substance of the instruction but say it was not warranted by the pleadings. The instruction is amply supported by the evidence, and under the pleadings it was the trial court's duty to instruct as to what injuries and damages were recoverable as a proximate result of the accident. It could be argued, with more force, that the failure to instruct on this issue would be prejudicial to defendants. There is no merit to this contention.

Defendants complain of the failure of the court to instruct the jury to reduce to its present worth any amount allowed for future damages. Defendants made no request for such an instruction. If a defendant does not tender an instruction proper to the evidence for a present worth recovery of damages, it is not error for the trial court to fail to instruct thereon. Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109; Patras v. Waldbaum, 170 Neb. 20, 101 N. W. 2d 465.

Defendants complain of the admission in evidence of a diagram, exhibit 9. This diagram is not drawn to scale, but it is a reasonably accurate and correct portrayal of the undisputed testimony of the witness St. Lucas simply showing the position of the two cars at the crosswalk and the St. Lucas car in the third lane of traffic about a car length back. It presents a visual picture of his verbal testimony which is undisputed. The introduction in evidence of a map, chart, or diagram

illustrating the scene of a transaction and the relative location of objects rests in the sound discretion of the court, and if they are reasonably accurate and correct are admissible in evidence. See Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

Finally, defendants complain that the verdict in the sum of $18,867 was excessive. The amount of damages in cases of this type is not based on any legal rule or formula for measuring them and rests largely in the sound discretion of the jury. It will not be set aside unless so clearly exorbitant as to indicate passion and prejudice or disregard of the evidence or controlling rules of law by the jury. Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393; Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376. Plaintiff's special medical expense was $2,367. He was in shock and near death in the hospital immediately after the accident. His main injuries were multiple fractures of the pelvis and fractures and dislocation in the area of the left hip joint. Pain and swelling of the left leg and foot were involved. There was hemorrhage from the fractures into the surrounding areas of his body. He was in traction about 6 weeks. He was not allowed to step on his left leg until November 16, 1963. He uses a cane, becomes tired after walking 2 or 3 blocks, his left foot is shortened, he has pain in his left foot and leg, and his left leg is swollen. The accident aggravated a previous heart condition. The evidence is that he can no longer work in the yard, help with the housework, paint, or do any of the things around the house he did before the accident. He drags his left foot, his left leg and foot ache at night, and he has to get up and massage his foot. There are other details of his injuries and pain and suffering which need not be recited here. At the time of the trial his condition had become stabilized. The medical testimony is that he has a 30 to 40 percent permanent partial disability of the left leg and a 20 percent permanent partial disability of the body as a whole. He has a permanent arthritic

condition in his left hip, limitation of motion, weakness of the left leg, and permanent vascular damage to the left lower extremity. He has practically no capacity to do any work and pain, suffering, and discomfort in varying degrees have been the companions of the limited recovery he has achieved. He has a life expectancy of about 10 years.

Defendants cite no comparable cases and, other than to state that the plaintiff is retired, 71 years of age, and lost no income, make no analysis of the evidence. It is hazardous to attempt to color match cases in this area but in Fridley v. Brush, *supra,* we sustain a $16,500 verdict in favor of plaintiff with a 15 percent disability of the right leg. Baylor v. Tyrrell, *supra,* is in many respects comparable, with a left hip and leg injury resulting in a 20 to 25 percent disability to a man with a 5-year life expectancy, where we sustained a verdict in the sum of $14,200. There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. It is a matter left largely to the discretion of the jury which saw the witnesses and heard the evidence. As we view the record, there is nothing to indicate that the verdict was the result of passion or prejudice or disregard of the evidence or controlling rules of law.

We have examined the whole record and the various contentions of the defendants in this case. The record is without prejudicial error and the judgment is affirmed.

AFFIRMED.

CARL R. ANDERSON & COMPANY, A CORPORATION, APPELLEE, V. HERMAN SUHR, APPELLANT.

149 N. W. 2d 101

Filed March 10, 1967. No. 36412.

1. **Trial: Appeal and Error.** The findings of a court in an action

at law have the effect of a verdict of a jury and will not be disturbed unless clearly wrong.

2. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
3. **Automobiles: Damages.** When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of damages in an action for negligence. However, the necessity for and the reasonable cost of such repairs must be factually proved by competent and relevant evidence.
4. **Trial: Damages.** Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. As a general rule, the evidence should be such as to enable the court or jury to determine the injury and the amount of damages with reasonable certainty or accuracy; and it is sufficient if they are so established.

Appeal from the district court for Seward County: JOHN D. ZEILINGER, Judge. Affirmed in part, and in part reversed and remanded.

Norval Brothers, for appellant.

Ivan A. Blevens, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and LYNCH, District Judge.

LYNCH, District Judge.

This is a law action arising out of the collision of a leased tractor-trailer and a school bus. The plaintiff-appellee is a California corporation, lessee of the tractor-trailer; and the defendant-appellant was the driver of the school bus. Jury was waived and the case tried to the court. Judgment was entered for the plaintiff in the sum of $1,500. Contributory negligence was alleged. The defendant did not pursue his cross-petition on appeal.

The defendant's complaints are in substance: (1) That the evidence as to liability was not sufficient to make a prima facie case for the plaintiff; and (2) that

plaintiff's proof of damages was not legally adequate as to amounts and causation.

"The findings of a court in an action at law have the effect of a verdict of a jury and will not be disturbed unless clearly wrong." Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315. "It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence." Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124.

Plaintiff's entire case consisted of the depositions of William Constantino, driver of the plaintiff's leased vehicle, and Kenneth B. Anderson, president of the plaintiff corporation at the time the depositions were taken. It was stipulated that objections made at the time of trial, along with the court's rulings thereon, would be entered in the bill of exceptions, together with the court's rulings on objections made at the time of the taking of the depositions.

Constantino testified that on November 21, 1963, while he was traveling east on U. S. Highway No. 34, the school bus came from a county road without stopping for a stop sign, made a left turn onto the highway, proceeded ahead of him for some distance, and then, as he was passing the bus after sounding his horn, the defendant attempted to turn left into a farmyard without giving an appropriate signal. He further stated that he had an overlap on the bus when defendant commenced his turn; that he hit the left side of the bus about in the middle; and that after the accident the defendant stated his directional lights were not working, he did not know the truck was behind him, and that he was at fault. Exhibits showing damage to the vehicles corroborate portions of this testimony.

We conclude that the record supports the trial court's findings as to liability.

The plaintiff concedes that the proof concerning certain elements of damage was somewhat less than legally adequate. These included claims for tolls, fines,

telephone calls, driver's extra pay, and loss of profits. However, plaintiff contends that the repair bills of Omaha Kenworth Sales & Service Company and Pike Trailer of Los Angeles and the rental bill of the Hertz Corporation were properly proved and that the total of these, $1,751.17, justifies the trial court's judgment.

Constantino testified that as a result of the accident the tractor's radiator was damaged, the wheels were out of balance, the front bumper was dragging against the wheels, and both windshields were broken. He also stated that a diesel tractor was rented from Hertz Rental in Omaha and that plaintiff incurred expenses of "Seven hundred and some odd dollars to the repair on the truck." No mention is made by this witness of Omaha Kenworth Sales & Service Company, Pike Trailer of Los Angeles, or of damage to an axle or the fifth wheel.

Photographs, exhibits 6, 7, and 8, developed in November 1963, show damage to the left and right front of the tractor. The radiator and windshields appear undamaged.

Kenneth B. Anderson testified that he has a statement from Omaha Kenworth Sales & Service Company for $797.57, two bills from Pike in Los Angeles, one for $214.46 and one for $139.22, and charges for rental of a tractor from the Hertz Corporation in the sum of $599.92. Kenworth's bill was not itemized, and Pike's charges were merely said to be for alignment, lights, axle repair, and for replacement of the fifth wheel.

The only other evidence as to damages was adduced by the defendant and it added nothing to the plaintiff's case. The plaintiff offered no invoices, statements, or receipts.

"When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of damages in an action for negligence. However, the necessity for and the reasonable cost of such repairs must be factu-

ally proved by competent and relevant evidence." Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255.

Also, in the case of Wylie v. Czapla, *supra*, our court cited the following rule relative to proof of damages. "Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. As a general rule, the evidence should be such as to enable the court or jury to determine the injury and the amount of damages with reasonable certainty or accuracy; and it is sufficient if they are so established." 25A C. J. S., Damages, § 162 (2), p. 79.

During the trial of the instant case, neither Omaha Kenworth Sales & Service Company nor Pike Trailer of Los Angeles was directly connected with the damages caused by the accident; the Kenworth repair bill was not detailed; Pike's charges included work not linked with the accident; the Hertz account was only generally referred to; and no effort was made to establish the necessity for or the reasonableness of any of the claims.

We must therefore conclude that the legal requirements as to proof of damages have not been satisfied and the judgment of the trial court relative thereto must be reversed. The cause is remanded for a new trial on the issue of damages only.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

IN RE ESTATE OF W. R. STRICKLAND, DECEASED. FLORENCE LAKE STRICKLAND, APPELLANT, V. OMAHA NATIONAL BANK ET AL., APPELLEES.

149 N. W. 2d 344

Filed March 10, 1967. No. 36425.

1. **Husband and Wife: Evidence.** In a suit between a wife, as the surviving spouse to an antenuptial contract entered into by her and her deceased husband, and the legatees, devisees, or beneficiaries under the will of her deceased husband, the wife has a

direct legal interest in the result of the action and is incompetent as a witness under the provisions of section 25-1202, R. R. S. 1943.

2. **Contracts.** Recitals contained in a contract are not strictly any part of its contractual provisions although they may be looked to in determining its proper construction or the intention of the parties. A recital may be varied or explained, but not so as to vary or defeat the instrument. As to such latter purpose, in the absence of efficient fraud, the person executing the contract is estopped from contradicting the recital.
3. **Husband and Wife: Contracts.** An antenuptial contract is valid if the formalities of the statute are met and if it is fair and fairly made by persons legally qualified to contract.
4. ———: ———. The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured.
5. ———: ———. A court, when called upon to consider the validity of an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding the particular case, and enforce or annul the agreement according to the facts disclosed.
6. ———: ———. Ordinarily the burden of proof to show the invalidity of an antenuptial contract is on the party alleging it, but if the contract is unjust and unreasonable to the prospective wife on its face, a presumption of fraud arises, the burden shifts, and it is incumbent on the husband, or his representatives, to prove the validity of the contract.
7. ———: ———. Due to the confidential relationship existing between prospective spouses, the courts scrutinize antenuptial contracts with care, the relationship being one of mutual trust and confidence.
8. ———: ———. While a disclosure by the prospective husband of his property should be full, fair, and open, a failure to divulge does not necessarily mean that the agreement will be condemned. The test of adequacy may still remain, and if it is met by a showing that it was fairly and honestly made under all the circumstances, the agreement may be enforced.
9. ———: ———. The basic issue where a complete disclosure is not made is fraud or overreaching, not the absence of disclosure.
10. ———: ———. Where there is no evidence of fraud, misrepresentation, or overreaching, and the terms of the contract and the surrounding circumstances indicate a mutual intent to preserve the prospective wife's property for her children by a former marriage, with indifference to acquiring any interest in

the property of the prospective husband, the contract not appearing otherwise to be unfair or unconscionable, the contract will be enforced.

11. ———: ———. In the absence of fraud or overreaching, or of unfairness or unreasonableness of such a degree as to void the contract, a man and woman, anticipating marriage, are as free to enter into an antenuptial contract as any other contract.

12. ———: ———. A valid antenuptial agreement is not affected by a party thereto giving by a last will something out of his estate to the other party to the agreement; the agreement continues effective, and the bequest does nothing more than favor the devisee or legatee to the extent provided in the will. It does not amount to a waiver of the antenuptial agreement by the testator, nor give to the wife the right to elect under the statute in lieu of the provisions of the will.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Harry H. Foulks, for appellant.

Doerr & Doerr, Burbridge & Burbridge, and Rickerson & Homan, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

CARTER, J.

This is an appeal from a judgment of the district court for Douglas County denying the right of a widow by her election to take the share of her husband's estate as provided by law contrary to the provisions of her husband's will.

The plaintiff, Florence Lake Strickland, and Dr. W. R. Strickland, her deceased husband, were married in Omaha, Nebraska, on April 30, 1951. It was a second marriage by both parties. Florence had a daughter by a previous marriage. Dr. Strickland had no children. Each had property of his own at the time of the marriage. Dr. Strickland was 78 years of age and Florence was 61 at the time of the marriage. They lived together until Dr. Strickland's death on October 10, 1962.

On April 27, 1951, 3 days before their marriage, the

parties entered into an antenuptial agreement by which each was to retain his own property free of any rights of the other as if a marriage was not entered into. On August 18, 1958, Dr. Strickland executed a last will and testament which was admitted to probate on November 7, 1962. On March 28, 1963, Florence filed in the county court of Douglas County an election to take under the statute rather than under her deceased husband's will.

It is the contention of the defendants that the antenuptial contract bars her right to elect under the statute. Florence asserts that the antenuptial contract is void in that Dr. Strickland did not, prior to and at the time the contract was signed, apprise her of the extent and value of his property. She also asserts that if the contract was ever binding, it was abrogated by the will of Dr. Strickland executed subsequent to the making of the antenuptial agreement.

The antenuptial agreement may be summarized as follows: Whereas a marriage is intended to be solemnized between the parties and the legal relations as to their respective properties may be different than they desire because of said marriage, and whereas the second party is the mother of a daughter by a previous marriage whom both parties desire should be protected against loss of her anticipated inheritance from her mother that would occur because of the marriage, they entered into the agreement. Thereafter each of the parties listed the properties they owned. The contract then states that the first party, Dr. Strickland, has seen or inspected and is familiar with all the real estate and has his opinion as to its value. It then states that the second party, Florence, has no personal property. The contract then states the intention of the parties to be that each would continue to own separately all property that each now owns, whether owned by either at the commencement of the marriage, or thereafter acquired, or coming to them during the marriage, as if the said proposed marriage had never been celebrated. Each party then agrees

and covenants to and with each other that, upon the death of either, the survivor shall not have and will not assert any claim, interest, estate, or title under the laws of any state, because of such survivorship in or to any property of the other and each waives all rights of dower and distributive interest which either would have in the property of the other and each likewise relinquishes to the heirs, administrators, executors, and assigns of the deceased any and all of his or her claims, distributive share, interest, estate, or title that he or she would otherwise be entitled to as the surviving husband or wife. The last paragraph of the contract provided: "To the full and proper performance of all of the foregoing agreements, covenants, and stipulations, the parties hereto respectively bind themselves, their heirs, executors, administrators, and assigns."

It is the contention of Florence that the antenuptial contract is void for the reason that Dr. Strickland failed to apprise her of the value of his property before the contract was entered into and that such failure, in effect, amounted to a fraud upon her sufficient to invalidate the contract. On the trial Florence attempted to testify that she had not seen or inspected Dr. Strickland's property before signing the antenuptial contract as stated in the antenuptial agreement. She offered, also, to testify that she did not know the amounts of money on deposit in building and loan associations in the city of Omaha, mentioned in the agreement, or how many building and loan associations were involved. She likewise offered to testify that the contract was prepared by Dr. Strickland's attorney, that she had not seen a copy of the contract prior to its signing, and that it was not read to her at the time of signing on April 27, 1951. She likewise offered to testify that she did not know that Dr. Strickland owned the property listed in the contract as belonging to him, and that she was advised by no one as to its value. Objections were made to this evidence by all defendants on the ground that the evidence was in

violation of the parol evidence rule and incompetent under the dead man's statute, section 25-1202, R. R. S. 1943. The objections were sustained by the court and offers of proof were made and overruled. These rulings are asserted as error in this appeal.

Section 25-1202, R. R. S. 1943, which we shall hereafter refer to as the dead man's statute, provides in part: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, * * *."

The general purpose of the statute is primarily to protect the estates of decedents from fraudulent and fictitious claims, and the strict construction of the statute adoped by our court does not encompass any situation where the witness has no direct legal interest in the result of the action. It does not contemplate a proceeding against an executor or administrator, the result of which can neither increase nor diminish the assets of the estate, but concerns only the manner in which the assets will be distributed. In such a proceeding an executor or administrator is not concerned with the merits of the claims of rival claimants in the sense that he should prefer one over the other, but is concerned only with seeing that the assets are properly distributed, either according to the testator's will or the statute, whichever may be held to be the proper criterion. Under the situation we have here, the executor is not an adverse party. In re Estate of Craig, 101 Neb. 439, 163 N. W. 765; In re Estate of Vetter, 139 Neb. 307, 297 N. W. 554; In re Estate of Vetter, 142 Neb. 167, 5 N. W. 2d 215.

But in the instant case, the beneficiaries of the will of the deceased were also parties defendant and each of them object to the evidence of the widow as being incompetent under the dead man's statute. This is, in fact, a contest between the widow claiming under the will on the one hand and the legatees, devisees, and

beneficiaries claiming against it on the other. Each is a person having a direct legal interest in the result of the action. The issue involves the validity of an antenuptial contract which the widow admits was signed by herself and her husband. This she is competent to do irrespective of the dead man's statute. In re Estate of House, 145 Neb. 866, 18 N. W. 2d 500, 159 A. L. R. 401. But we point out that the widow is incompetent as a witness to testify against any person having an interest in the result of the litigation because of her own direct legal interest therein which is adverse to the legal interests of the legatees, devisees, and beneficiaries. While this precise point does not appear to have been decided by this court, no reference having been cited to us and since we have found none, we determine that it falls squarely within the principle announced in analogous cases and that the widow is an incompetent witness. Thompson v. DeVoe, 180 Neb. 654, 144 N. W. 2d 188; Fischer v. Wilhelm, 140 Neb. 448, 300 N. W. 350; Johnson v. Omaha Loan & Bldg. Assn., 128 Neb. 37, 257 N. W. 370.

Objections were also made that the evidence of the widow was objectionable as contravening the parol evidence rule. A written contract expressed in unambiguous terms is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents. The parol evidence rule is not merely one of evidence, but is a rule of substantive law which declares that certain kinds of facts are legally ineffective and forbids them to be proved. Gerdes v. Omaha Home for Boys, 166 Neb. 574, 89 N. W. 2d 849. Recitals as a general rule are not strictly any part of a contract although they may be looked to in determining the proper construction of the contract or the intention of the parties. Consequently mere recitals of fact in a written contract, as distinguished from contractual provisions, may be varied without violating the parol evidence rule. 17A C. J. S., Contracts, § 314, p. 177; Schommer v. Bergfield, 178 Neb.

140, 132 N. W. 2d 345. A recital in an antenuptial contract may be varied or explained to be something other than stated, but not so as to vary or defeat the instrument for the purpose for which it was given. As to such latter purpose and that only, in the absence of efficient fraud, the person executing the contract is estopped from contradicting the recital. Bibelhausen v. Bibelhausen, 159 Wis. 365, 150 N. W. 516. The following language of the antenuptial contract: "Whereas, second party has seen or inspected and is familiar with all of said real estate and has her opinion of its value," is usually considered a mere recital not within the parol evidence rule. Warner's Estate, 207 Pa. 580, 57 A. 35, 99 Am. St. Rep. 804; Baker v. Baker, 24 Tenn. App. 220, 142 S. W. 2d 737. We think, therefore, that a wife who has entered into an antenuptial agreement may show by competent evidence that the extent of her deceased husband's estate was concealed from her at and prior to the signing of the agreement notwithstanding she acknowledged therein that she had been informed of the extent of his estate.

This brings us to the question of whether or not, with or without the excluded evidence of the wife, the trial court erred in withdrawing from the jury the issue involved in attempting to set aside the antenuptial contract. The plaintiff's case in this respect proceeds wholly upon the theory that upon their engagement to marry, a confidential relation between them arose which placed upon the defendants the burden of showing, in subsequently entering into the contract, that the deceased acted in good faith with the plaintiff by making a full disclosure with respect to his financial circumstances at the time. There is no evidence in this record, admitted or offered, of any active fraud or misrepresentation as to the deceased's property or financial circumstances at the time the antenuptial contract was made.

The parties were married on April 30, 1951. The husband was 78 years of age and the wife 61 at that time.

The husband died on October 10, 1962, more than 11 years later. They lived together during the period of the marriage in a home in Omaha owned by the wife. The husband had been married many years previously. His first wife died 3 months after the marriage and he never remarried until his marriage here involved. He had no children, and at the time of his death he had neither parents, brothers or sisters, nor children. He had practiced as a physician for many years and had been long acquainted with Florence and her former husband, Dr. Lake, who was also a practitioner in the medical profession. He had accumulated property over the years, the value of which is not shown as of the date of the contract.

The wife had been previously married to Dr. Lake who died in 1944. She is the mother of a daughter, now married. At the time of the execution of the antenuptial contract, she was the owner of property that came to her from her former husband, the value of which is not shown by the record.

On April 27, 1951, 3 days before the marriage, the parties entered into the antenuptial contract here in question. The evidence shows that the husband employed the attorney who drafted the contract. The attorney testified that he was employed by and advised with Dr. Strickland, after which he prepared the agreement. On the day of the signing, the parties came to his office together and, after signing the instrument, they left together. No one else was present at the time of signing. The attorney was interrogated as to whether or not anything was said by either party as to the value of the other's property. Objections were sustained to these questions, after which plaintiff offered to prove that nothing was said. The attorney was asked if he knew as a fact that the statement in the contract was true, when he placed it there, which recited: "Whereas, second party has seen or inspected and is familiar with all of said real estate and has her opinion of its value."

Objections were sustained and plaintiff offered to prove by the witness that he knew it was not true. We think the questions as to whether or not anything was said by the parties prior to the execution of the contract as to the value of the property of either was competent and we shall consider the case as if the question had been answered in the negative. As to the question regarding the quotation from the contract, we think it was properly sustained as a privileged communication between attorney and client. The plaintiff will not be permitted to reap any benefit accruing to her in showing that the husband employed and paid the attorney to draft the contract and then avoid the privilege that attaches to such relationship.

Antenuptial contracts are valid in this state if made in accordance with section 30-106, R. R. S. 1943. An antenuptial contract is valid if fair and fairly made by persons legally qualified to contract. Rieger v. Schaible, 81 Neb. 33, 115 N. W. 560; In re Estate of Maag, 119 Neb. 237, 228 N. W. 537. Antenuptial contracts are not against public policy, but on the contrary, if freely and intelligently made, they are regarded as generally conducive to marital tranquillity and the avoidance of disputes concerning property. In re Estate of Enyart, 100 Neb. 337, 160 N. W. 120. The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured. In re Estate of Maag, *supra;* In re Estate of Enyart, *supra.* A court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all antenuptial arrangements. Rieger v. Schaible, *supra;* Wulf v. Wulf, 129 Neb. 158, 261 N. W. 159.

A confidential relationship usually exists between

prospective spouses. Ordinarily the burden of proof as to the invalidity of an antenuptial contract is on the party alleging it; but if the contract is unjust and unreasonable to the prospective wife on its face, a presumption of fraud arises, the burden shifts, and it is incumbent on the husband to prove the validity of the contract. Baker v. Baker, *supra;* Christians v. Christians, 241 Iowa 1017, 44 N. W. 2d 431; Del Vecchio v. Del Vecchio (Fla.), 143 So. 2d 17. Although there is nothing inherently suspicious about antenuptial agreements, the courts scrutinize them with care because the relationship of the parties is one of mutual trust and confidence at the time it is entered into. In re Estate of Enyart, *supra.* The burden is not on the woman to inquire but on the man to inform. In re Estate of Maag, *supra.* While a disclosure by the prospective husband should be full, fair, and open, a failure to divulge does not necessarily mean that the agreement will be condemned. The test of adequacy may still remain, and if it is met by a showing that it is fairly and honestly made under all the circumstances, the agreement may be enforced. The basic issue is fraud or overreaching, not the absence of disclosure. In re Estate of Cantrell, 154 Kan. 546, 119 P. 2d 483; McClellan Estate, 365 Pa. 401, 75 A. 2d 595.

In one sense of the term, every antenuptial contract is unfair, at least by legislative standards indicated in the statute of descent and distribution. The very purpose of the contract is to be unfair by those standards. We can hardly say, under such a contract, that an apparently unreasonable provision for the wife or a disproportion between what she is to receive and the value of his property *of itself* affords a basis for voiding such a contract. Unless there be fraud or overreaching, the contract is valid. This is the effect of our holding in Kingsley v. Noble, 129 Neb. 808, 263 N. W. 222, wherein we overruled the fifth point of the syllabus in In re Estate of Enyart, *supra.*

The antenuptial contract shows that each of the parties was possessed of considerable property at the time the contract was signed and the marriage celebrated. The contract sets out the property belonging to the husband as three residences and a life estate in a fourth, all in Omaha; a lot and quarter section of land in Powers County, Colorado; and an unimproved quarter section of land in Rock County, Nebraska, the values of which are not shown. The contract shows the property of the wife as three lots in Omaha occupied by a store building and a residence, and two farms of 640 acres each in Cass County, Nebraska, the values of which are not shown. The contract provides, after reciting the purpose of the agreement, that the plaintiff is the mother of a daughter of a previous marriage and that both parties desire that their marriage shall not interfere with the disposition of plaintiff's property to her daughter. The husband had no children, parents, or brothers and sisters. It is plain from the contract itself that the motivating factor in the making of the contract was to protect the plaintiff's property for the benefit of her daughter as against any legal interest of the prospective husband. This inference is further borne out by the statement by the husband that he has seen or inspected and is familiar with all said real estate and has his opinion of its value, a provision usually made applicable only to the prospective wife.

The evidence shows that the wife had a social standing practically the same as the husband and that she was an intelligent woman who had owned and looked after her property interests since the death of her first husband in 1944. The contract did not provide for the transfer of any property to her, a fact she must have known. She was not in need of support, presently or prospectively. She now asserts that she was not informed of the value of the husband's property and was therefore defrauded, when she well knew at the time she was getting no property at all. If she knew that

she was to get nothing, as she did, a failure to disclose the value of the husband's property appears to have been of little consequence to her at the time. That the wife had knowledge of the purpose and substance of the contract is not denied by the evidence or offer of proof, but it does indicate that she was completely indifferent as to the pecuniary phase of the case incident to the proposed marriage and was intent only upon the other advantages of the agreement. She had a right to assume that her husband, who was 17 years her senior, would die before her. For 11 years she lived with her husband, knowing of the existence of the contract and, so far as this record shows, made no effort to nullify or change its effect. Only after his death, when her purpose of protecting her property from the legal entanglements resulting from the proposed marriage for the daughter had been fully and finally accomplished, did she ever claim fraud in order to share in his property by disavowing the agreement. Her offer to prove that she signed the agreement without having it read to her can avail her nothing in the absence of proof that any artifice was used to prevent her from knowing its contents. Baker v. Baker, *supra.*

There is not a word of evidence in this case showing fraud, misrepresentation, or overreaching on the part of Dr. Strickland. The only question for consideration is whether or not the agreement was so unfair, unreasonable, and unconscionable as to require this court to set it aside. It is plain that the contract was more beneficial to her purposes than those of Dr. Strickland. We fail to see how the contract is unfair, unreasonable, or unconscionable. After succeeding in protecting her property for her daughter during the existence of the marriage and knowing for 11 years of the existence of the contract, with a complete absence of fraud or overreaching, it is with poor grace and a complete want of equity that she now asserts its invalidity.

In the absence of fraud or overreaching, or of unfair-

ness or unreasonableness of such a degree as to void the contract, a man and woman, anticipating marriage, are as free to enter into an antenuptial contract as any other agreement. There is not the slightest inference that Dr. Strickland did not deal honestly, sincerely, and in good faith in all matters bearing on the proposed agreement. Under all the circumstances of the case, which we are required to scrutinize with care, we think the plaintiff acted understandingly when she made the agreement in question. She accomplished her primary objective in protecting her property for the benefit of her daughter. Her interest in the property of Dr. Strickland was one of indifference as the contract indicates. She appears to be an intelligent woman with some business experience. She knew what she was doing when she signed the contract. It was not until she could feel secure in the protection of her own property for the benefit of her daughter that she was willing to question the validity of the contract. Valid reasons existed for making the contract she did. She had adequate property of her own for her own support. She was not in need, then or prospectively. Having received the benefit of the contract, and her husband's lips having been sealed by death, she will not now, after a lapse of 11 years, be permitted to avoid her contract, no fraud or unreasonableness being shown, and recover that which she gave up as a consideration for the contract in the first place. Bibelhausen v. Bibelhausen, *supra*; Baker v. Baker, *supra;* Wulf v. Wulf, *supra.*

Since it is the very purpose of an antenuptial contract to exclude the operation of statutory law with respect to the property rights of the parties, such an agreement usually contains a release by one or both of the parties of the rights that would otherwise attach. This contract is no exception. But it is here contended by the wife that the deceased, by making a bequest to her in his will, invalidated the antenuptial agreement. This is not the law. She is entitled to take the bequest, but

she may not reject it and claim under the statute instead, for there is no merit in the contention that the husband by making the bequest waived the antenuptial agreement. Will of Paulson, 254 Wis. 258, 36 N. W. 2d 95; Bartle v. Bartle, 121 Colo. 388, 216 P. 2d 649.

No fraud, deceit, or concealment can be found in this case. Plaintiff was not overreached or mislead, and she was fully aware of the effect of the contract upon her rights. Her primary concern was the protection of her own property for the benefit of her daughter by a previous marriage and she appeared wholly indifferent to the matter of financial return from her future husband's property when she signed the contract. The waiver of all property rights by each in the property of the other was not unconscionable under all the evidence and circumstances shown. She is bound by the contract she understandingly made.

AFFIRMED.

RODEO TELEPHONE MEMBERSHIP CORPORATION, APPELLANT, v. COUNTY OF GREELEY, STATE OF NEBRASKA, ET AL., APPELLEES.

149 N. W. 2d 357

Filed March 10, 1967. No. 36428.

1. **Taxation.** Formulas or standards are merely methods for determining the ultimate fact of valuation for purposes of taxation. There are no settled and infallible rules for determining actual value.
2. **Telecommunications: Taxation.** The value of the property of a telephone utility as returned to the Nebraska State Railway Commission for rate-making purposes may be considered in arriving at actual value for taxing purposes.
3. **Taxation.** There is a presumption that the county board of equalization properly performed its official duties in determining actual value for tax purposes, and the burden is on the taxpayer to establish that the valuation for tax purposes is excessive.

4. **Telecommunications: Taxation.** The use of a formula or standard in determining the actual value of the tangible personal property of a telephone company is not improper in the absence of evidence that it was arbitrary, capricious, or unreasonable. The taxpayer must establish that the application of the formula resulted in the assessment of its property at more than its actual value, or violated the constitutional requirement that taxes on tangible property be levied uniformly and proportionately.

Appeal from the district court for Greeley County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Vogeltanz & Kubitschek, for appellant.

Clarence A. H. Meyer, Attorney General, Homer G. Hamilton, and Harold E. Connors, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

MCCOWN, J.

The valuation of tangible personal property of a telephone company for tax purposes is involved. The plaintiff, Rodeo Telephone Membership Corporation, owns and operates a telephone system extending into several counties. For the year 1964 the company filed its tangible personal property tax schedule for its property in Greeley County, Nebraska, and reported an actual value of $43,270. The actual value was increased to the sum of $86,088. Plaintiff's protest was rejected by the county board of equalization. Plaintiff appealed to the district court where its petition was dismissed and this appeal followed.

The essential question is whether or not a formula not specified by statute, based upon valuations reported by the taxpayer to the Nebraska State Railway Commission for rate purposes, may be used as the principal basis for fixing actual value of the property for tax purposes. The formula involved here is based on the value of the property of a telephone company returned to the railway commission for rate-making purposes. After deduc-

tions for real estate and personal property otherwise valued and taxed, the figure is further reduced by 40 percent for depreciation. The resulting figure becomes the actual value of tangible personal property to which the statutory assessment percentage is applied. This assessed valuation is then allocated on a mileage basis to the various counties in which the company operates. The manager of the plaintiff conceded that the figures in its report to the railway commission reported the values of its property in their true sense. There is no issue of uniformity raised and this method of valuation is used for all telephone companies in Nebraska.

As nearly as we can determine, the plaintiff's position is that only the Legislature may prescribe standards and methods for determination of value and the use of any formula not prescribed by the Legislature is somehow illegal or improper. The ultimate facts to be established are value and uniformity in the case of the ad valorem tax on tangible property provided for by the Constitution of Nebraska. Formulas or standards, whether set by the Legislature or used by others, are merely methods for determining the ultimate fact of value. They are ordinarily used by taxing authorities as a practical means of meeting the constitutional requirements of uniformity. There are no settled and infallible rules for determining the actual value of telephone systems any more than there are for railroads, pipelines, or other types of utility property. See Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment, 170 Neb. 106, 101 N. W. 2d 873. Telephone companies and other forms of communication and transportation companies are not readily bought and sold, nor do they have a readily ascertainable market value. In any case of tax valuation, " 'Actual value is largely a matter of opinion. There are no yardsticks by which it can be determined with complete accuracy.' " Richards v. Board of Equalization, 178 Neb. 537, 134 N. W. 2d 56. Even the formula set out in section 77-112, R. R.

S. 1943, specifically states that it shall be used "where applicable."

Plaintiff argues that the value of its property as returned to the railway commission for rate-making purposes should not be used in arriving at actual value for taxing purposes. It also contends that the whole value should not be allocated to the parts to be assessed in each taxing jurisdiction. These arguments are answered by the old case of State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716. That case included the statement: "Whether it be for the purpose of fixing reasonable rates for the transportation of passengers and carrying of freight, or for the purpose of taxation, the rule to be applied in ascertaining the value of the property should be the same." We agree with the district judge that the 40 percent allowance for depreciation here seems reasonable, if not excessive, in arriving at an actual value for taxation.

The plaintiff contends that telephone poles and wires and equipment should be valued individually and wishes to exclude labor and engineering costs involved in the construction and unification of a telephone system. No authority whatever is cited for this position. The value of the raw material and component parts in a telephone system no more reflects its actual value than the value of the raw materials and component parts in an automobile or a house represent their value.

In this case the evidence by witnesses from the telephone industry itself was that the formula used here was fair and reasonable and tends to promote uniformity of assessment of telephone companies.

There is a presumption that the county board of equalization properly performed its official duties in determinating actual value for tax purposes and the burden is on the taxpayer to establish that the value for tax purposes is excessive. Richards v. Board of Equalization, *supra*.

The use of a formula or standard in determining the

actual value of the tangible personal property of a telephone company is not improper in the absence of evidence that it was arbitrary, capricious, or unreasonable. The taxpayer must establish that the application of the formula resulted in the assessment of its property at more than its actual value, or violated the constitutional requirement that taxes on tangible property be levied uniformly and proportionately. Here the plaintiff has failed to maintain its burden of proof on these issues.

For the reasons stated, the determination of the district court was correct and is affirmed.

AFFIRMED.

MAURINE G. SCOVILLE, APPELLANT, V. LOUIS J. FISHER ET AL., APPELLEES.

149 N. W. 2d 339

Filed March 10, 1967. No. 36434.

1. **Easements: Adverse Possession.** The use and enjoyment which will give title by prescription to an easement or other incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate.
2. ———: ———. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period.
3. ———: ———. A permissive use of the land of another, that is a use or license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued.
4. ———: ———. To establish a prescriptive right to an easement, it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription.
5. **Adverse Possession.** While ordinarily the user of another's land is presumed to be adverse, when an owner permits his unenclosed and unimproved land to be used by the public, or his neighbors generally, a user thereof by a neighboring landowner, and others, however frequent, will be presumed to be permissive

and not adverse, in the absence of any attendant circumstances indicative of the contrary.

6. **Easements.** The general rule is that the use of a way common to the public is not "exclusive" within the meaning of that term; such use is regarded as negativing a presumption of grant to any individual user.

7. ———. While the term "exclusive" does not mean that this easement must be used by one person only, it does mean that the use is not dependent upon a similar right in others and that the use must be exclusive as against the community or public at large.

Appeal from the district court for Cedar County: JOHN E. NEWTON, Judge. Affirmed.

Robert G. Scoville, for appellant.

Brogan & Monen and Paul R. Robinson, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ.

WHITE, C. J.

Plaintiff brings this action is equity to establish a prescriptive easement for ingress and egress and other purposes over defendants' appurtenant town lot in the business section of Hartington, Nebraska. The trial court denied her relief and she appeals. We affirm the judgment.

Defendants own Lot 13, Block 30 of the Original Town of Hartington, 25 feet wide, facing west on Washington Avenue, the main business artery of the town. To the east and rear of their building on this lot is an unimproved and unenclosed (until June 1965) area designated areas A1 and A2 on exhibit 1, which is the subject of dispute in this case. Area A2 is 25 by 27 feet immediately to the south of the building and the adjoining area A1 is 12 by 25 feet stretching east to the north-south alley running to the east of both plaintiff's and defendants' property. Plaintiff owns an area 13 by 25 feet in the northeast corner of Lot 13 on which is located a warehouse. Immediately to the north of defendants' Lot

13 is an open area 52 feet long, east and west, and 12 feet wide which opens into the alley on the east and furnishes access to and abuts the rear of plaintiff's business property. Plaintiff's building, which houses Marge's Cafe on the west and the Chief Bar on the east, faces north and fronts on Fifth Street. The rear doors of the cafe and bar open to the south into the 52 by 12 foot strip which is adjacent to areas A1 and A2 on Lot 13. In June of 1965 the defendants, Fishers, erected a cement block wall about 32 to 36 inches high around the two unenclosed and unimproved areas designated as A1 and A2 thus preventing the plaintiff's use of these areas and precipitating this litigation.

The evidence in this case, mostly on behalf of plaintiff, is practically undisputed. The 52 by 12 foot strip or area immediately to the south and rear of the plaintiff's building furnishes access to it, but it has been convenient to use the adjoining unenclosed and open portion of defendants' lot (areas A1 and A2) for parking, unloading of trucks, deliveries, and the passage of customers to and from the plaintiff's business properties and other businesses in the area. The areas in dispute, A1 and A2, are open and unenclosed, have no defined parts or marks on them, are graveled, and hard packed. For many years beyond the prescriptive period of 10 years they have been used for customer parking and delivering areas, not only to plaintiff's building, but to many other buildings and businesses in the area. Trucks turned, maneuvered, and parked in these areas as they serviced the various businesses in the area. Areas A1 and A2 were used by the plaintiff and anybody who wanted to, and the public used these areas as a parking lot when patronizing plaintiff's business properties, others in the area, or shopping elsewhere in town. Customers and people generally crossed the areas on foot. Plaintiff, her tenants, and their customers used these areas in the same manner. Although there is no evidence of express permission, it is readily and reasonably

inferable that defendants and their predecessors in title permitted this use without objection through the years. And there is no evidence that the plaintiff or any of the people using these areas did so under any claim of right adverse to defendants or their predecessors in title. The only conclusion to be drawn from the evidence is that the various uses by the public, customers of the various businesses, plaintiff, deliverymen, and others were permissive in nature.

Plaintiff's use of the area in question was neither under a claim of right adverse to the defendants or their predecessors in title nor was it exclusive. We shall discuss first the requirement that the use be adverse. The law with relation to this element and with regard to the distinction between an adverse and permissive user is well set out in Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547, wherein it is said: " 'An easement by prescription can be acquired only by an adverse user for ten years. Such use must be open, notorious, exclusive and adverse.' Onstott v. Airdale Ranch and Cattle Co., 129 Neb. 54, 260 N. W. 556. See, also, Omaha & R. V. Ry. Co. v. Rickards, 38 Neb. 847, 57 N. W. 739.

"The use and enjoyment which will give title by prescription to an easement or other incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, *under a claim of right,* continuous and uninterrupted, open and notorious, *exclusive,* with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. See 28 C. J. S., Easements, § 10, p. 645.

" 'A prescriptive right is not looked on with favor by the law, and it is essential that all of the elements of use and enjoyment, stated above, concur in order to create an easement by prescription.' 28 C. J. S., Easements, § 10, p. 645.

" 'A *permissive* use of the land of another, that is a use or license exercised in subordination to the other's

claim and ownership, *is not adverse* and cannot give an easement by prescription no matter how long it may be continued, * * *.' 28 C. J. S., Easements, § 14, p. 655.

"To establish a prescriptive right to an easement, *it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription.* See Sachs v. Toquet, 121 Conn. 60, 183 A. 22, 103 A. L. R. 677." (Emphasis supplied.)

In this case the evidence shows the original use of these areas to have been permissive. There is no evidence that the plaintiff, or any of the many other users, ever informed the defendants or their predecessors in title that they claimed as a matter of right a perpetual easement across defendants' land. The plaintiff, along with many others and the public generally, used and crossed the defendants' land. But there is no evidence that such use was adverse, under a claim of right.

In Stubblefield v. Osborn, *supra,* a somewhat comparable case, in disposing of the contention that the use was presumptively adverse because it was open, continuous, and visible for more than the prescriptive period, we said: "The most that can be said as to their crossing the lands in question is that it was permissive only, a neighborly act on the part of the owners or tenants on the land. There was no claim of ownership on the part of plaintiffs of such a nature that they openly and forcibly asserted directly against the actual owners of the land in such a manner that the owners would be required to take affirmative action against the plaintiffs."

We are not unmindful of the general rule stated in Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196, to the effect that a presumption of adversity arises when there has been open, visible, continuous, and unmolested use for the prescriptive period of 10 years. The same contention was made in Stubblefield v. Osborn, *supra.* The general rule must be interpreted in the light of the facts of each case. In none of the cases cited can we

find a comparable situation to the present case. Here we have unenclosed land with no defined pathway across it and where, paraphrasing Stubblefield v. Osborn, *supra,* the most that can be said of the plaintiff, the public, and the many other various users of the whole area was that their use was permissive only, a neighborly act on the part of the owners or tenants on the land. Applicable here is what this court said in Burk v. Diers, 102 Neb. 721, 169 N. W. 263, as follows: "Oftentimes farmers or owners of city lots, out of mere generosity and neighborly feeling, permit a way over their land to be used, when the entire community knows that the use is permissive only, without thought of dedication or adverse user. This use ought not to deprive the owner of his property, however long continued. Such rule would be a prohibition of all neighborhood accommodations in the way of travel."

We think the proper rule applicable to the facts in this case is well stated in 4 Tiffany, Law of Real Property (3d ed.), § 1196a, p. 565, as follows: "While ordinarily, as above stated, the user of another's land is presumed to be adverse, such a presumption does not exist, it seems, in the case of unenclosed land or, as it may be otherwise expressed, evidence that the land is unenclosed is sufficient to rebut the presumption. And it has been decided that when one throws his land open to the use of the public, or of his neighbors generally a user thereof by a neighboring landowner, however frequent, will be presumed to be permissive and not adverse, in the absence of any attendant circumstances indicative of the contrary."

The rule is stated in 25 Am. Jur. 2d, Easements and Licenses, § 46, p. 457, as follows: "A way may be acquired by one person over the uninclosed land of another by user or prescription, but it generally requires some circumstance or act in addition to, or in connection with, the use of the way to indicate that the use has been claimed as a right and has not been regarded by

the parties merely as a privilege revocable at the pleasure of the owner of the soil."

Closely comparable cases involving city lots or property, supporting this holding, are Allen v. First National Bank of Arvada, 120 Colo. 275, 208 P. 2d 935; Lambert v. Huntsman, 306 Ky. 862, 209 S. W. 2d 709; Anson v. Tietze, 354 Mo. 552, 190 S. W. 2d 193; Clarke v. Clarke, 133 Cal. 667, 66 P. 10. See, also, Jones on Easements, § 270, p. 225; Washburn's Easements and Servitudes (4th ed.), § 86, p. 150; 39 C. J. S., Highways, § 23, p. 942; 28 C. J. S., Easements, § 18d (2), p. 668.

We hold, therefore, that when an owner permits his unenclosed and unimproved land to be used by the public, or by his neighbors generally, a user thereof by a neighboring landowner and others, however frequent, will be presumed to be permissive and not adverse in the absence of any attendant circumstances to the contrary. Defendants' land was unenclosed and plaintiff, other neighbors, and citizens made use of it as a passageway and for the parking and unloading of vehicles when it was convenient to do so. There is no presumption, under these circumstances, of an adverse use and there is no evidence of any claim of right to the use of the property adverse to the defendants. The plaintiff's case must fail on this ground alone.

The evidence also shows that the plaintiff's use was not exclusive within the meaning of the applicable rule. It is obvious from the record that plaintiff's use of the areas was a use she shared with the public generally. Persons shopping in town generally parked their cars there. Deliverymen delivering to all stores in the areas used it. Consumers and customers of all businesses in the areas used it. The use must be exclusive. The general rule is that the use of a way in common to the public is not "exclusive" within the meaning of that term; such use is regarded as negativing a presumption of grant to any individual user. Missionary Soc. of Diocese v. Coutu, 134 Conn. 576, 59 A. 2d 732; Stanley v. Mullins,

187 Va. 193, 45 S. E. 2d 881; Town of Paden City v. Felton, 136 W. Va. 127, 66 S. E. 2d 280; 25 Am. Jur. 2d, Easements and Licenses, § 59, p. 468. In order to establish an independent prescriptive right the individual user must perform some act to the knowledge of the servient owner clearly indicating his individual claim of right. See, 28 C. J. S., Easements, § 15, p. 658, and cases cited in notes 39 and 41; Stanley v. Mullins, *supra;* Town of Paden City v. Felton, *supra;* South Norwalk Lodge v. Palco Hats, Inc., 140 Conn. 370, 100 A. 2d 735; Pirman v. Confer, 273 N. Y. 357, 7 N. E. 2d 262, 111 A. L. R. 216; Annotation, 111 A. L. R. 221; 25 Am. Jur. 2d, Easements and Licenses, § 59, p. 468; 28 C. J. S., Easements, § 15, p. 658.

The term "exclusive" does not mean that the easement must be used by one person only. Jurgensen v. Ainscow, *supra.* But it does mean that the use does not depend on a similar right in others and that it must be exclusive as against the community or public at large. 25 Am. Jur. 2d, Easements and Licenses, § 59, p. 468; 28 C. J. S., Easements, § 15, p. 658; Jurgensen v. Ainscow, *supra.* Here hardly a more nonexclusive use could be found. This unenclosed vacant land was a parking and crossing area used by the public and all neighboring owners and businesses in the area. Plaintiff's right was a similar one to all others using the area and it was mutual, and not exclusive, of others exercising the permissive use of the area permitted by defendants and their predecessors in title. To hold that plaintiff's use in this case was exclusive would be tantamount to eliminating this requirement for the establishment of a prescriptive right. For the reasons given, the district court's findings and judgment are correct and are affirmed.

AFFIRMED.